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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 130.

BAR ASSOCIATION

T. H. DAVISON ET AL., OWNERS OF THE STEAMSHIP "WICKHAM," APPELLANTS,

vs.

GEORGE A. VON LINGEN, CARL A. VON LINGEN, AND WILLIAM G. ATKINSON, COPARTNERS AS A. SCHUMACHER AND COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

FILED OCTOBER 18, 1881.

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1 THE UNITED STATES OF AMERICA, } *to wit:*
District of Maryland, }

At a circuit court of the United States for the fourth circuit, in and for the district of Maryland, begun and held at the city of Baltimore, on the first Monday of November, being the first day of the same month, in the year of our Lord one thousand eight hundred and eighty.

Present: The Honorable Hugh L. Bond, circuit judge; Thomas J. Morris, judge Maryland district; Archibald Stirling, Esq., attorney; John M. McClintock, Esq., marshal; James W. Chew, clerk.

Among other were the following proceedings, to wit:

GEORGE A. VON LINGEN & others, Appellants,
vs.
T. H. DAVISON & others, Appellees,
and
SAME
vs. } Cross-libel.
SAME.

2 Be it remembered that heretofore, to wit, on the 11th day of May, in the year of our Lord 1880, the appellants aforesaid, by their proctors, filed in the circuit court here the transcript of record from the district court of the United States for the district of Maryland, in the words and of the tenor following, to wit:

THE UNITED STATES OF AMERICA, } *to wit:*
District of Maryland, }

At a district court of the United States for the district of Maryland, begun and held at the city of Baltimore, on the first Tuesday of March, being the second day of the same month, in the year of our Lord one thousand eight hundred and eighty.

3 Present: The Honorable Thomas J. Morris, judge Maryland district; Archibald Stirling, Jr., Esquire, attorney; John M. McClintock, Esquire, marshal; James W. Chew, clerk.

Among other were the following proceedings, to wit:

Libel. Filed 16th Sept., 1879.

In the District Court of the United States for the District of Maryland. In Admiralty.

GEORGE A. VON LINGEN & others
vs.
T. H. DAVISON & others,
and
T. H. DAVISON & others
vs. } Cross-libel.
GEORGE A. VON LINGEN & others.

To the honorable Thomas J. Morris, judge of said court:

4 The libel of George A. Von Lingen, Carl A. Von Lingen,

and William G. Atkinson, copartners, trading in the city of Baltimore, under the firm name and style of A. Schumacher & Company, against T. H. Davison, N. G. Clayton, J. Johnson, J. Liddell, Jr., and C. Liddell, B. Bramwell, H. H. Bell, W. White, G. Pickering and H. Andrews, A. Drysdale, R. Brown and T. W. Bulman, A. Wardlow and E. Easten, T. V. S. Angier and Earl Onslow, J. Bolt, W. Bourne and E. F. Bourne, J. Elliott, E. Raffey, S. Dixon and C. W. Dixon, A. A. Angier, H. J. McCulloch, W. Wright, W. Chisholm, S. Cole, D. Brown, J. W. Nichol, J. Straker, G. P. Blackett, J. Romanes and J. F. Moffatt, G. Drysdale and T. Ord, owners of the steamship "Whickham," in a cause of contract, civil and maritime, alleges and articulately propounds as follows, to wit:

First. That on the first day of August, 1879, the libellants, having previously made a contract which required them to ship during that month a cargo of grain to Europe, and requiring a vessel for that purpose, communicated these facts to the agents of the said defendants, and the said defendants, through their said agents, on the day and year aforesaid, made with the libellants a charter party, whereby they contracted that their steamer, the "Whickham," had then sailed, or was about to sail, from Benizaf with cargo for Philadelphia, and that she should, with all convenient speed, sail and proceed to Philadelphia or Baltimore, at charterers' option, after discharge of outward cargo at Philadelphia, and there take on board a full and complete cargo of grain for the charterers, and proceed therewith to any one of certain designated ports in Europe for orders to discharge at a safe port in the United Kingdom or on the continent between Bordeaux and Hamburg, both included, Rouen and Holland excluded, as by a copy of said charter party, marked "Exhibit A," herewith filed as a part of this libel, will more fully appear.

Second. That said steamer had not sailed from Benizaf at the time of the execution of said charter party, and that she was not then about to sail therefrom.

Third. That by reason of the said breach by the said defendants of their said contract and warranty, and the delay in the arrival of the said steamer in Philadelphia arising therefrom, the libellants were not afforded an opportunity of loading said steamer with grain either in Philadelphia or Baltimore, during the month of August, 1879, and she did not in fact arrive in Baltimore until after the expiration of said month, nor did she arrive in Philadelphia in time to discharge her inward cargo and load with grain during said month; and the defendants did not in fact, nor did any one in their behalf, notify the libellants of her arrival in and her readiness to receive cargo at Philadelphia, at all, and in consequence thereof the libellants were compelled, at greatly increased expense and at much higher rates of freight, to charter another vessel for that purpose, and were otherwise greatly damaged.

Fourth. That by the breach on the part of the defendants of the contract and warranty aforesaid, the libellants have sustained $2,000 damages, for which they seek reparation in this suit.

Fifth. That the said defendants are not within reach of the pro-

cess of this court, but that they have property and credits within reach thereof.

Sixth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore the libellants pray that process in due form of law may issue against the said defendants, with a clause therein commanding the marshal to attach their property and credits, if they cannot be found, and that this honorable court will decree the payment of the libellants' aforesaid claim with interest and costs.

T. WALLIS BLACKISTONE,
Proctor for Libellants.

CARL A. VON LINGEN.

Subscribed and sworn to by Carl A. Von Lingen, this 16th Sept., 1879.

JAS. W. CHEW, *Clk.*

8 The defendants having, on the day of the filing of this libel, appeared to the same, by their proctor, Archibald Stirling, Jr., Esq., the prayer of said libel for an attachment against their property and credits, if said defendants could not be found, is refused, they having already appeared.

Sep. 18, 1879. THOS. J. MORRIS,
District Judge.

EXHIBIT "A."

Grain Charter Party, —— Steamer.

PHILADELPHIA, *Aug.* 1*st*, 1879.

It is this day mutually agreed between T. H. Davison, Esq., owner of the Br. steamship "Whickham," of London, built 1876, at Newcastle, of 1,124 net tons register or thereabouts, classed 100 A 1 in Br. Lloyds, now sailed or about to sail from Benizaf with cargo for Phila., and Mess. A. Schumacher & Co.—

9 That the said steamship being tight, staunch, and strong, and in every way fitted for the voyage, with liberty to take outward cargo to Phila. for owners' benefit, shall with all convenient speed sail and proceed to Philada. or Balto., at charterers' option, after discharge of inward cargo at Phila., or as near thereunto as she may safely get, and there load afloat from said charterers, or their agents, a full and complete cargo of grain, and 1 or other lawful merchandise, excluding petroleum or its products. Vessel to load under inspection of either American or British Lloyd's surveyors at her expense, and to comply with their rules. The cargo to be brought to and taken from alongside at merchants' risk and expense, not exceeding what she can reasonably stow and carry over and above her cabin, tackle, apparel, provisions, and furniture, and being so loaded shall therewith proceed to Queenstown, Falmouth, or Plymouth, for orders to discharge at a safe port in the United Kingdom, or on the continent between Bordeaux and Hamburg, both included (Rouen excluded), also Holland excluded, or as near

thereunto as she may safely get, and deliver the same, always afloat, on being paid freight as follows: six shillings and three pence
10 sterling per quarter of 480 lbs. delivered of wheat or maize, other grain or stowage goods to pay in full and fair proportion thereto as customary at loading port; ten per cent. extra if discharged on the continent as ordered from port of call in the United Kingdom as above; if ordered to a direct port of discharge on the continent as above on signing bills of lading, the rate to be the same as to the United Kingdom for orders.

In full of port charges and pilotages (the act of God, restraints of princes and rulers, the dangers of the seas and navigation, accidents to boilers, machinery, etc., always excepted), freight being paid on unloading and right delivery of the cargo in cash without discount or allowance.

Captain to call at broker's office as requested, and sign bills of lading as presented without prejudice to this charter party.

Freight as per bills of lading to be taken without deduction in payment of this charter, any deficiency to be paid at port of loading on signing bills of lading in cash less insurance, and any surplus over and above estimated charter to be settled there before vessel clears at the custom-house by captain's draft in charterers'
11 favor upon consignee, payable five days after arrival at port of discharge.

Stevedore employed by vessel to be approved by charterers, provided charges for stowing are not above current rate, and vessel to load and discharge at such wharf or in such dock as may be named by charterers or their agents, provided no extra detention or expense is thereby incurred by vessel, charterers paying the ordinary expense of towage after the first move, should vessel have to haul for cargo more than once, and time so expended to count as lay-days.

Fifteen (15) running days (if the vessel be not sooner dispatched), commencing when vessel is all ready and prepared to receive cargo and written notice thereof given to charterers, to be allowed for loading and discharging vessel, and if longer detained charterers to pay demurrage at the rate of forty (£40) pounds British sterling or its equivalent per day.

Should the steamer be ordered to discharge at a port on the continent as above, where there is not sufficient water for the steamer to enter the first tide after arrival and to lie always afloat, lay-days are to count from 24 hours after arrival off the port, and any lighterage incurred to reach the port of discharge is to be at the ex-
12 pense and risk of the cargo, any customs of the port to the contrary notwithstanding.

Charterers' liability under this charter to cease on cargo being shipped, but the vessel to have a lien thereon for all freight, dead freight, demurrage, or average.

Cash for vessel's ordinary disbursements at port of loading to be advanced by charterers, if required by master, at current rate of exchange, subject to two and a half per cent. commission and insurance only.

The vessel to be consigned to H. L. Gregg & Co., or their agents,

at port of loading, paying one commission only of two per cent. and usual freight brokerage, ¼ of a *P.*, on the amount due under this charter-party.

A commission of five per cent. is due on execution of this charter-party to T. H. Davison, vessel lost or not lost, whose agents at port of discharge are to attend to ship's business on customary terms.

Lighterage, if any, to be for account and risk of receiver of cargo.

Penalty for non-performance of this agreement, estimated amount of freight.

GEO. BLASSE, witness to the signature of—

(Signed) H. L. GREGG & CO.

By cable authority from T. H. Davison.

13 A. ALBERT, witness to the signature of—

A. SCHUMACHER & CO.,

Pp. OSOON LUIGAN.

We hereby certify that the foregoing is a true and correct copy of the original charter party on file in our office.

H. L. GREGG & CO.

Summons.

THE UNITED STATES OF AMERICA, } *to wit:*
District of Maryland, }

The President of the United States of America to the marshal for the Maryland district, Greeting:

We command that you summon T. H. Davison, N. G. Clayton, J. Johnson, J. Liddell, Jr., C. Liddell, B. Bramwell, H. H. Bell, W. White, G. Pickering & H. Andrews, A. Drysdale, R. Brown, T. W. Bullman, A. Wardlow, E. Easten, T. V. S. Angier, Earl Onslow, J. Bolt, W. Bourne, E. F. Bourne, J. Elliott, E. Raffey, S. Dixon, C. W. Dixon, A. A. Angier, H. J. McCulloch, W. Wright, W. Chisholm, S. Cole, D. Brown, J. W. Nichol, J. Straker, G. P. Blackett, J. Romanes,
14 J. F. Moffatt, G. Drysdale, T. Ord, owners of the steamship "Wickham," if they be found in your district, to appear before the judge of the district court of the United States of America for the district of Maryland, at the United States court-room in the city of Baltimore, on the first Tuesday of December next, to answer unto the libel of George A. Von Lingen, Carl A. Von Lingen, & William G. Atkinson, copartners, trading as A. Schumacher & Co., in a cause of contract, civil and maritime, and how you shall execute this precept you may make known to us in our district court for the district aforesaid, and have then and there this writ.

Witness the Honorable Thomas J. Morris, judge of our said district court, this 18th day of Sept., in the year of our Lord one thousand eight hundred and seventy-nine.

Issued 18 day of Sept., 1879.

[L. S.] JAS. W. CHEW, *Clerk.*

Endorsed: "I hereby accept service for all the within-named defendants. A. Stirling, Jr., proctor. Sep. 18th, 1879."

Marshal's Return.

"Sept. 18th, 1879, service accepted by A. Stirling, Jr., proctor.
JOHN M. McCLINTOCK,
U. S. Marshal.

15 *Answer. Filed 1st Dec.* 1879.

In the District Court of the United States for the District of Maryland.

To the Hon. Thomas J. Morris, judge of said court:

The answer of T. H. Davidson, and the other owners of the steamer Wyckham, as the same are named in the libel of George A. Von Lingen and others, trading as A. Schumacher and Company, against said owners, in this court exhibited, to the said libel, articulately propounds as follows:

These respondents have no knowledge that the libellants at the time of the making of the charter party in the libel mentioned had priorily made a contract which required them to ship during the month of August, 1879, a cargo of grain to Europe, as is alleged in the first article of the libel, and if said allegation be determined to be material to the issues of the suit, they demand that libel-
16 lant shall prove the same; and respondent say that said allegation alleges facts which in law are not material or competent to be proved in the cause. These respondents further say that they have no knowledge that said alleged facts were communicated to the agents of respondents, as is also alleged in said first article, and require libellants to prove the same, if material; and respondents say that said alleged fact of communication is not material or competent in law to be proved in the cause.

Respondents admit that they did, through their agents, on the 1st day of August, 1879, make with libellants the charter party mentioned in said first article of the libel, a copy of which they admit to be filed and exhibited with said libel, and they aver that said charter party, the terms of which are shown by said copy, is the only contract, and the whole of the contract between libellants and respondents in reference to the steamer "Wickham," or to any engagements of respondents in regard thereto.

Further answering, & to the second article of the libel, respondents say that the steamer "Wickham," at the time of the
17 execution of said charter party, was about to sail from Benizaf, within the true intent and meaning of the language of said charter party.

And further answering to the third article, they say that said steamer did, with all convenient speed, sail and proceed to Philadelphia, and there, without delay, discharged her inward cargo, and as soon as discharged proceeded without delay to Baltimore, and was, without delay, tendered to libellants to load according to the charter party, and was refused by libellants for the sole cause as alleged by them that respondents had broken said charter party by the vessel not being, as alleged by libellants, at Benizaf, about to sail on the 1st day of August, 1879, which breach respondents then

denied and now deny; and libellants wholly refused to be bound by the charter; and respondents aver that said vessel proceeded from Philadelphia to Baltimore in conformity to said charter party, and that libellant made no objection to her having so proceeded, but refused to load solely on the allegation aforesaid as to the
18 clause "about to sail," and that libellants *were* aware of the arrival in Philadelphia and of the time she finished discharge of inward cargo.

And respondents say that the allegations of the 3d clause of the libel, that the vessel did not arrive at Baltimore until after the expiration of the month of August, and that by reason of the delay on the arrival of the vessel libellants were not afforded an opportunity of loading her with grain during the month of August, are in law not material or competent to be proved in the cause.

Respondents have no knowledge that libellants were compelled to charter, nor whether they did charter, another vessel, as alleged in said 3d article, nor whether such vessel was chartered at higher rates of freight, and they require the same to be proved, if material, and they deny that said allegations are material or competent to be proved in this cause.

Further answering to the 4th article, respondents deny that libellants have suffered any damage by reason of any breach of said charter party on the part of respondents, and they allege that
19 they have in all respects kept and performed all the terms and conditions of said charter party on their part, and that libellants have not kept the terms and conditions thereof on their part, but have broken the same by refusing to receive and load said vessel with cargo as by the said charter required.

A. STIRLING, JR., *Proctor.*

(Endorsed:) "Answer admitted without oath. T. W. Blackistone, for libellants."

Cross-libel. Filed 1st Dec., 1879.

In the District Court of the United States for Maryland. In Admiralty.

To the Honorable Thomas J. Morris, judge:

The cross-libel of T. H. Davidson, M. G. Clayton, J. Johnson, J. Liddell, Jr., & C. Liddell, B. Bramwell, H. H. Bell, W. White, G. Pickering and H. Andrews, A. Drysdale, R. Brown and T. W. Bulman, A. Wardlow and E. Eastern, T. V. S. Angier and Earl
20 Onslow, J. Bolt, W. Bourne and E. A. Bourne, J. Elliott, E. Ruffey, S. Dixon and C. W. Dixon, A. A. Angier, H. J. McCulloch, W. Wright, W. Chisholm, S. Cole, D. Brown, J. W. Nicholl, J. Straker, G. P. Blockett, J. Romanes and J. F. Moffatt, G. Drysdale and F. Ord, owners of the steamer Wickham, against George A. Von Lingen, Carl A. Von Lingen, and William G. Atkinson, of the Maryland district, trading as A. Schumacher & Co., alleges and propounds as follows:

First. This libel is filed as a counter claim by the libellants herein

to the claim made by the respondents herein against said libellants by a libel filed in said court, and now pending therein, which libel claims damages for alleged breach of the charter party hereinafter mentioned, a copy of which is filed with said libel, which copy has, by the answer of the libellants herein filed to said libel of respondents herein, been admitted to be a true copy of the charter made between libellants and respondents.

Second. That on the first day of August, 1879, libellants,
21 as owners of said steamer, by their agents, H. L. Gregg & Co., of Philadelphia, by a charter-party, dated on said day, chartered said steamer to libellants for a voyage from Philadelphia or Baltimore, at charterers' option, to certain ports in Europe designated in said charter, with a cargo of grain to be furnished the vessel by the charterers. Libellants to receive, as provided in the charter, freight at the rate of six shillings three pence sterling per quarter of 480 pounds. That, among other things in said charter provided, it was agreed mutually between libellants and respondents that said steamer then sailed, or about to sail, from Benisaf with cargo for Philadelphia, should, with all convenient speed, proceed to Philadelphia or Baltimore, at charterers' option, after discharge of inward cargo at Philadelphia, and load from charterers a full cargo of grain or other lawful merchandize, excluding petroleum, and, being loaded, proceed to certain ports in Europe in said charter named.

That fifteen running lay-days, commencing when said vessel was ready to receive cargo, and written notice thereof given charterers, should be allowed for loading and discharging vessel; and if
22 longer detained, charterers to pay damage at the rate of £40 British sterling, or its equivalent, per day, and that the penalty for non-performance of said agreement of charter should be the estimated amount of freight.

Third. And libellant- further alleges that said vessel, on the day of the date of said charter, was about to sail from Benisaf, and that she did, in pursuance of said charter, proceed, with all convenient speed, to Philadelphia, with inward cargo, and being discharged of inward cargo, did, in accordance with said charter, proceed to Baltimore, and was ready to receive cargo from charterers, of which written notice was given them; but the respondents, without cause, refused to receive and load said vessel, and repudiated said charter on the sole ground, as by them alleged, that said vessel was not, on August 1st, about to sail from Benisaf.

That said steamer, as soon as possible after said refusal, was rechartered at the risk of respondents at the best rate that could be had on a charter similar, as to cargo and ports of designation
23 and general provisions, to said charter with respondents, but with a much lower rate of freight. That said recharter was made in New York for a voyage from New York to Europe, and so made because a better freight was obtained than could be obtained at that time in Baltimore. That the difference of freight upon said recharter was the sum of $1,912.58. That the increased expense to the vessel by loss of time in going to New York—port charges paid

at New York, wharfage and expenses paid at New York— amounted to the sum of one thousand dollars and upward.

Fourth. That the estimated amount of freight on the charter party with respondents is the sum of sixteen thousand dollars.

Fifth. That four days demurrage are due libellants on said charter by delay caused by respondents.

Sixth. That libellants have kept the said charter on their part in all respects, but that respondents have broken the same
24 on their part by refusing, as aforesaid, to receive and load said vessel, by which breach of said charter libellants have lost by the difference of freight, as aforesaid, on recharter, nineteen hundred and twelve dollars and fifty-eight cents, and the right has accrued to libellants to recover as the penalty provided by the charter for non-performance of the same the said estimated amount of freight, or an amount not greater than the same, and equal to the amount of damage to libellants by breach of said charter.

And libellant- claims three thousand dollars as such damage.

Wherefore libellants pray process in due form of law of summons against said defendants, and that the court will decree in favor of libellants' claim and for costs, and that libellants may have such other and further relief as their case may require.

A. STERLING, JR.,
Proctor Libellants.

25 *Summons.*

THE UNITED STATES OF AMERICA, } *to wit:*
District of Maryland, }

The President of the United States of America to the marshal for the Maryland district, Greeting:

We command you that you summon George A. Von Lingen, Carl A. Von Lingen, and William G. Atkinson, if they be found in your district, to appear before the judge of the district court of the United States of America for the district of Maryland, at the United States court-room, in the city of Baltimore, on the first Tuesday of December next, to answer unto T. H. Davidson, N. G. Clayton, J. Johnson, J. Liddell, Jr., H. Liddell, B. Bramwell, H. H. Bell, W. White, G. Peckering, H. Andrews, A. Drysdale, R. Brown, T. W. Bulman, A. Wardlow, E. Eastern, T. V. L. Angier, Earl Onslow, J. Bolt, W. Bourne, E. F. Bourn-, J. Elliott, E. Ruffey, S Dixon, C. W. Dixon, A. A. Angier, H. J. McCulloch, W. Wright, W. Chisholm, S. Cole, D. Brown, J. W. Nicholl, J. Straker, G. B. Blockett, J. Romanes, J. F. Moffatt, G. Drysdale, T. Ord, owners of the steamer *Whickham*, and how you shall execute this precept you may make
26 known to us, in our district court for the district aforesaid, and have then and there this writ.

Witness the Honorable Thos. J. Morris, judge of our said district court, this first day of December, in the year of Lord one thousand eight hundred and seventy-nine.

Issued 1st day of December, 1879.

[SEAL.] JAS. W. CHEW, *Clerk.*

2—130

Marshal's Return.

"1879, Dec. 1st. Summoned.

JOHN M. McCLINTOCK,
U. S. Marshal."

Answer. Filed 6th January, 1880.

In the District Court of the United States for the District of Maryland.

To the Honorable Thomas J. Morris, judge of said court:

The answer of George A. Von Lingen, Carl A. Von Lingen,
27 and William G. Atkinson, copartners, trading as A. Schumacher & Company, to the cross-libel of T. H. Davidson & others, owners of the steampship "Whickham," as the same are named in said cross-libel in this court exhibited, articulately propounds as follows:

First. These respondents admit the truth of the first article of said cross-libel.

Second. The respondents admit that on the first day of August, 1879, the libellants, by their agents, executed the charter party referred to with the respondents for the use of the said steamship "Whickham," a copy of which is filed in this court, with the libel heretofore filed by the respondents against the said owners of the said steamship, and they pray to refer to the same for the terms, conditions, warrantys, and agreements therein contained.

Third. That the libellants contracted among other things in said charter party that the said steamer had sailed, or was about to sail, from Benizaf on the first of August, 1879, with cargo for Philadelphia, and that being in every way fitted for the voyage, with
liberty to take outward cargo to Philadelphia for owners'
28 benefit, she should with all convenient speed sail and proceed to Philadelphia or Baltimore, at charterers' option, after discharge of inward cargo at Philadelphia.

Fourth. That said steamer had not sailed from Benizaf, nor was she about to sail therefrom on said first day of August, 1879, but, on the contrary, she had not her outward cargo on board, and did not, in fact, complete her loading of it until six o'clock in the evening of the seventh of that month, and did not sail from Benizaf until half-past seven o'clock p. m. of that day.

Fifth. That when said steamer did sail from Benizaf she was not provided and in every way fitted for said voyage, and did not sail and proceed to Philadelphia or Baltimore with all convenient speed, but, on the contrary, she sailed from Benizaf without a supply of coal for the voyage aforesaid, and stopped at Gibraltar to obtain a proper supply.

Sixth. That said charter party provided that the respondents should have fifteen running days for loading and discharging
the cargo which they were to ship on said steamer under
29 said charter, which days were to count from the time when she should be all ready and prepared to receive said cargo,

and written notice thereof given to the respondents. But the respondents say that they received no written notice of said vessel's arrival and readiness to receive cargo from them at Philadelphia, although they had the option under said charter of loading her there or in Baltimore as they might prefer.

Seventh. That in consequence of the said defaults of said steamer and her owners and agents, she did not arrive in Philadelphia or Baltimore, at either of which places the respondents had the option of loading her under said charter, and the respondents did not receive written notice of her readiness to receive cargo from them, as required by said charter-party, until it was too late for them to use said steamer for the purposes for which they had chartered her, which purposes they communicated to the agents of said steamer at the time said charter-party was executed.

Eighth. That in consequence of the delays and defaults
30 above set forth the respondents were compelled, before the arrival of said steamer, to charter another vessel in her place at a loss of $2,000, and when said steamer did arrive, they refused to accept and load her, as they are advised they had a right to do.

Ninth. The respondents do not know whether said steamer "Whickham" was rechartered as soon as possible after her refusal by them or not, or whether at the best obtainable rate of freight, or where said recharter was made, or for what voyage, or what was the difference in the freight money, or what, if any, loss of time or money accrued to her owners in obtaining the same, and they require proof thereof, but they deny that there is any dam*m*age or loss of any kind which can be chargeable to them, and they aver that whatever and all loss of time or money that has accrued to either the libellants or respondents by reason of the refusal on the part of the latter to accept & load said steamer, has been solely due to the defaults, delays, and laches of said steamer and her agents and owners.

Wherefore the respondents pray that said cross-libel may
31 be dismissed with costs.

T. W. BLAKISTONE,
Proctor for Resp'ts.

It is agreed that the allegations set up as matters of defence in this answer shall be treated as averments in the libel heretofere filed by the respondents against the libellants, and that under the answer to said libel the respondents may offer any evidence and take any defence which might be admissable under any proper state of the pleadings.

T. W. BLAKISTONE,
For Schumacher & Co.
A. STIRLING, Jr.

32 *Commission. Issued 13th Dec.*, 1879.

THE UNITED STATES OF AMERICA, } *To wit:*
District of Maryland, }

The President of the United States of America to George
[SEAL.] F. Betts, Esq., commissioner named on the part of the libellants:

Know ye that you are appointed commissioner to examine witnesses in a case depending in the district court of the United States for the district of Maryland between T. H. Davidson *et al.*, libellants, against George A. Von Lingen and others, respondents; therefore, you are requested, after having taken the oath hereunto annexed, and also administered the annexed oath to the person whom you shall appoint as clerk to attend the execution of this commission; that at such time and place as to you shall seem convenient you cause to come before you all the witnesses named in the annexed interrogations, and that you examine them upon their corporal oaths, to be by you administered on the Holy Evangely of Almighty God, touching their knowledge or remembrance of anything
33 that may relate to the cause aforesaid upon said interrogations; and, having reduced the depositions of witnesses so taken by you into writing, you send the same with this commission, closed under your hand and seal, to the said district court with all convenient speed.

Witness the Honorable Thomas J. Morris, judge of our said district court, at Baltimore, this 13th day of December, in the year eighteen hundred and seventy-nine.

Issued the 13th day of December, 1879.

JAS. W. CHEW,
Clerk of our said District Court.

Commissioner's Oath.

You shall, according to the best of your skill and knowledge, truly, faithfully, and without partiality to any or either of these parties, take the examinations and depositions of all and every witness and witnesses produced and examined by virtue of the commission hereunto annexed upon the interrogations now hereto annexed, so help you God.

The above oath was administered by me, this 17th day of
34 December, A. D. 1879, to George F. Betts, the commissioner within named.

[SEAL.] THOS. ALEXANDER, JR.,
Notary Public, N. Y. County.

Clerk's Oath.

You shall truly, faithfully, and without partiality to any or either of the parties in this case, take, write down, and transcribe the depositions of all and every witness or witnesses produced before and examined by the commissioner, as far forth as you are directed and

employed by the said commissioner, to take, write down, and transcribe the said depositions, or any of them, so help you God.

The above oath was administered by me to Thomas Alexander, Jr., by me appointed clerk, before I proceeded to execute this commission.

GEO. F. BETTS, *Commissioner.*

35 At the execution of a commission, issued out of the district court of the United States for the district of Maryland the 18th day of December, in the year of our Lord eighteen hundred and seventy-nine, directed to George F. Betts, empowering him to examine witnesses in a case pending in said court between T. H. Davidson *et al.*, libellants, and Geo. A. Von Lingen *et al.*, defendants, I, George F. Betts, the commissioner in the said commission named, having assigned this 17th day of December, in the year of our Lord eighteen hundred and seventy-nine, at No. 60 Wall street, in the city of New York and State of New York, as the time and place for the taking of said commission, and having taken the oath to said commission annexed, and having appointed Thomas Alexander, Jr., clerk, and he also having taken the oath to the said commission annexed, proceeded to take the following depositions, to wit:

JOHN GIBSON, being duly sworn in due form of law.

1st Inter. State your name, age, and residence.

36 Answer. My name is John Gibson; my age is 39 years; and my residence is Havelock street, Blyth, England.

2nd Inter. What position do you occupy on the steamer "Whickham," and how long have you occupied the same, and did so occupy on the voyage of the steamer to Benisaf, and from Benisaf to Philadelphia and Baltimore in August and September last?

Answer. I am chief mate of the steamer "Whickham;" have been mate about four months. I was chief mate on said steamer on the voyage of the same to Benisaf, and from there to Philadelphia and Baltimore in August and September last.

3rd Inter. If you answer to the 2d interrogatory that you did occupy said position on said voyage, state on what day the steamer arrived at Benisaf, and whether with cargo or in ballast; if cargo, what kind of cargo, and from what port did the vessel sail for Benisaf.

Answer. The steamer arrived at Benisaf on the 26th of July; I say so from memory, as I have not the log; she arrived there

37 in water ballast; she sailed from Lisbon to Benisaf.

4th Inter. Where was the steamer on the 1st day of August, 1879?

Answer. On the 1st day of August, 1879, the steamer was at Benisaf.

5th Inter. On what day did the vessel sail from Benisaf, and as near as you can say, at what hour of the day?

Answer. The steamer sailed from Benisaf on the 7th of August, 1879; I say so from memory, as I have not the log; she sailed on that day at 7.30 p. m.

Sixth Inter. For what port did the steamer sail when she left Benisaf, and with what cargo did she sail from Benisaf?

Answer. When the steamer left Benisaf she sailed for Gibralter with a cargo of iron ore; from Gibralter we proceeded to Philadelphia, where the cargo was to be discharged; we stopped at Gibralter for coal.

7th inter. On what day did the taking in of cargo at Benisaf
38 begin, and on what day was the cargo all in, and, if you can, give the the hours of such days of the beginning and finishing of taking in cargo?

Answer. We commenced the taking in of cargo at Benisaf on the 28th of July, 1879, and completed our loading on the 7th of August; on that day, the cargo was all in. I don't remember what hour of the day we commenced taking in cargo; I remember we finished at about 6 o'clock in the afternoon of the 7th of August, and sailed about an hour and a half afterward; I remember this, because the cargo was all lying about the deck when we sailed.

8th Inter. Was there any delay in the discharge of cargo or ballast (whichever it was) at Benisaf, and was such discharge proceeded with diligently and with dispatch, or otherwise?

Answer. There was no delay in the discharge of the ballast at Benisaf; there never is with water ballast on our steamer, as it does not interfere with taking in of cargo, the water ballast was pumped out by the engineer; he can better answer the latter part of
39 the question; I should say there was diligence in taking it out.

9th Inter. Was there any delay in taking in cargo at Benisaf, and was the cargo taken in with diligence and dispatch, or otherwise?

Answer. There was no delay in taking in cargo at Benisaf on the ship's account; when we commenced taking in cargo it was taken in with diligence and dispatch; there was some delay in loading at first, owing to other steamers being there before us, and who had their turn and right to be loaded before us; we did not give way to any other steamer; for the first three days we were interfered with more or less in unloading by the steamers which were there before us; after that, we were loaded right along; the delay may have amounted to about 2 days in all.

10th Inter. Was the steamer, while at Benisaf, and when she sailed from thence, seaworthy and well fitted, and was her machinery in good order or otherwise?

Answer. When the steamer sailed from Benisaf she was
40 seaworthy, and I should think her machinery was in good order; she was well fitted out.

11th Inter. Had she a full complement of officers and men, and was she equipped and ready to sail as soon as loading of cargo could be finished, or were the facts otherwise?

Answer. She had a full complement of officers and men, and she was ready for sailing as soon as loading of cargo could be finished.

12th Inter. Was the vessel's voyage from Benisaf to Philadelphia

delayed in any way, and was the voyage prosecuted with dispatch, or otherwise?

Answer. The voyage of the vessel from Benisaf to Gibralter was not delayed in any way, but was prosecuted with dispatch.

13th Inter. On what day did the vessel begin to discharge cargo at Philadelphia, and when did she finish discharging?

Answer. On the 2nd of September, and finished on the 6th of September.

41 14th Inter. Was the discharge of cargo at Philadelphia with dispatch or otherwise?

Answer. With dispatch.

15th Inter. When did the vessel leave Philadelphia, and when did she arrive at Baltimore?

Answer. On the 7th of September, and arrived at Baltimore Sept. 9, 1879.

Cross-interrogatories:

1st cross-inter. If you should say, in reply to the third interrogatory-in-chief, that the "Whickham" went to Benizaf last July or thereabouts, in ballast, state what kind of ballast, and how she discharged it, by lighters, or otherwise.

Answer. Water ballast, which was pumped out.

2nd cross-inter. On what day and at what hour of the day did she finish discharging ballast, and on what day and at what hour did she commence to take in cargo, and on what day and at what hour did she finish taking in cargo?

42 Answer. I couldn't tell; she commenced taking in cargo on the 28th—cannot tell the hour—and finished on the 7th of September at about 6 o'clock p. m.

3rd cross-inter. How was the cargo put on board of her?

Answer. Hauled up the ship's sides from small boats in baskets.

4th cross-inter. State fully the facilities for loading a cargo of iron ore in the "Whickham" at Benizaf.

Answer. Small boats carrying from 5 to 7 tons each come alongside of the steamer, which was lying about a quarter of a mile from the coast in the roads; it is passed up to the ship's side in small baskets of about 15 to the ton; there are two or three stages from the boats to the ship, and two men at each stage receiving and passing the baskets to the next stage. There were two gangs of men on each side of each hatch; we had four hatches, so that we had eight boats alongside at one time unloading into the ship; there were a large number of boats around the steamer waiting to take their

43 place at the ship's side as room was made for them.

5th cross-inter. Where is the captain who commanded the Whickham on said voyage from Benizaf to Philadelphia, and where is the log-book containing the entries from July 31st to August 30th, 1879, and why are they not with said steamer?

Answer. I don't know where the captain is; he has left the ship; the log-book was sent to T. H. Davidson, the owner of the steamer; it is the rule to send the log-book to the owners after every voyage. As to the captain, I don't know why he left the vessel.

6th cross-inter. Did not vessels, at the time the Whickham was at Benizaf, have to await their turn at loading? If yea, state how many vessels were there to load ahead of the Whickham at the time of her arrival.

Answer. We waited for our turn, but I cannot tell whether that is the custom at that port; there were two vessels there ahead of us at the time of our arrival.

JOHN GIBSON.

44 Subscribed & sworn to before me, this 17th day of December, A. D. 1879.

GEO. F. BETTS,
U. S. Commissioner, Southern District of N. Y.

EDWARD BERRY, being duly sworn in due form of law.

1st. Inter. State your name, age, and residence.

Answer. My name is Edward Berry; age, 37 years; residence, 40 Blackfriar street, Aberdeen.

2d Inter. What position do you occupy on the steamer "Whickham," and how long have you occupied the same, and did so occupy on the voyage of the steamer to Benisaf and from Benisaf to Philadelphia and Baltimore in August and September last?

Answer. I am chief engineer; have been so for nearly 2 years; was chief engineer in the voyage from Benisaf to Philadelphia and Baltimore.

3d Inter. If you answer to the 2d interrogatory that you
45 did occupy said position on said voyage, state on what day the steamer arrived at Benisaf, and whether with cargo or in ballast; if cargo, what kind of cargo, and from what port did the vessel sail for Benisaf.

Answer. The 26th of July, 1879, in water ballast from the port of Lisbon.

4th Inter. Where was the steamer on the 1st day of August, 1879?

Answer. In Benisaf.

5th Inter. On what day did the vessel sail from Benisaf, and, as near as you can say, at what hour of the day?

Answer. On August 7th, at 7.30 p. m.

6th Inter. For what port did the steamer sail when she left Benisaf, and with what cargo did she sail from Benisaf?

Answer. For Philadelphia by way of Gibralter for coal, with a cargo of iron ore; we had coaled last before leaving the Tyne for Lisbon.

46 7th Inter. On what day did the taking in of cargo at Benisaf begin, and on what day was the cargo all in? And, if you can, give the hours of such days of the beginning and finishing of taking in cargo.

Answer. On the 28th of August, some time in the forenoon, as near as I can tell; the cargo was all in on Sept. 7th, about 6 p. m.

8th Inter. Was there any delay in the discharge of cargo or bal-

last (which even it was) at Benisaf; and was such discharge proceeded with diligently and with despatch or otherwise?

Answer. At the request of the foreman of the iron ore mine the ballast was left in at the commencement of the loading so that the ship would be deeper down in the water and they would have less distance to pass the ore up the ship's sides; the ballast was taken out at night after the ship was three-quarters loaded and when the men had left off work; it was pumped out with the donkey engine in about four hours during the night; I can't tell which night it was.

47 9th Inter. Was there any delay in taking in cargo at Benisaf; and was the cargo taken in with diligence and despatch or otherwise?

Answer. Not after it arrived alongside ship; what delay there was on shore we knew nothing about; when it arrived alongside ship it was taken in with all despatch, as quick as it could be taken.

10th Inter. Was the steamer, while at Benisaf, and when she sailed from thence, seaworthy and well fitted; and was her machinery in good order or otherwise?

Answer. Yes, she was seaworthy, well fitted, and her machinery in first class order.

11th Inter. Had she a full complement of officers and men; and was she equipped and ready to sail as soon as lading of cargo could be finished, or were the facts otherwise?

Answer. Yes, she was; and steam was up six hours before she had finished taking in cargo.

48 12th Inter. Was the vessel's voyage from Benisaf to Philadelphia delayed in any way; and was the voyage prosecuted with despatch or otherwise?

Answer. It was not delayed in any way, but was proceeded with with despatch.

13th Inter. On what day did the vessel begin to discharge cargo at Philadelphia, and when did she finish discharging?

Answer. September 2nd, 1879, and finished discharging Sept. 6th, at night.

14th Inter. Was the discharge of cargo at Philadelphia proceeded with [with] despatch or otherwise?

Answer. Yes; for two or three nights at Philadelphia they were worked all night, besides the day.

15th Inter. When did the vessel leave Philadelphia, and when did she arrive at Baltimore?

Answer. She sailed Sept. 7th, 5.30 a. m., and arrived at Baltimore on the 9th, at noon.

49 Cross-interrogatories:

1st Cross-inter. If you should say, in reply to the third interrogatory-in-chief, that the "Whickham" went to Benizaf last July or thereabouts in ballast, state what kind of ballast, and how she discharged it, by lighters, or otherwise.

Answer. Water ballast, which was pumped out with a donkey engine.

2d Cross-inter. On what day and at what hour of the day did she finish discharging ballast, and on what day and at what hour did she commence to take in cargo, and on what day and at what hour did she finish taking in cargo?

Answer. It was discharged at night. I don't remember what night. She commenced taking in cargo on the 28th of July, some time in the forenoon, and finished taking in cargo August 7th, at 6 p. m.

3rd Cross-inter. How was the cargo put on board of her?

Answer. By little baskets passed up the ship's side.

50 4th Cross-inter. State fully the facilities for loading a cargo of iron ore on the "Whickham," at Benizaf.

Answer. The iron ore is filled into little baskets and put into boats, carrying 5, 6, or 7 tons, by which it is brought to the ship's side, and it is then passed up the ship's side and emptied into the hold; there were four hatches on the ship, with a stage on each side of the vessel; this would enable eight of these small boats to unload into the ship at one time.

5th Cross-inter. Where is the captain who commanded the Whickham on said voyage from Benizaf to Philadelphia, and where is the log-book containing the entries from July 31st to August 30th, 1879, and why are they not with said steamer?

Answer. I saw him last in Hull, England; he is not aboard the ship now, and is no longer master of her; the log-book (the engineer's log-book) was sent to the owners at the termination of said voyage, because it is customary to send them in at the end

51 of each voyage. I do not know why the captain is no longer master of said ship; his name was Captain Gardner.

6th Cross-inter. Did not vessels at the time the Whickham was at Benizaf have to await their turn at loading? If yea, state how many vessels were there to load ahead of the Whickham at the time of her arrival.

Answer. I cannot say; there were two steamers there when we arrived, and they were both loaded and got away ahead of us.

EDWARD BERRY.

Subscribed & sworn to before me, this 17th day of December, A. D. 1879.

GEO. F. BETTS,
U. S. Commissioner, Southern District of N. Y.

52 JOHN C. SEAGER, being duly sworn in due form of law:

1st Inter. What is your business, and where do you reside?

Answer. Steamship agent and general ship broker, at 63 Beaver street, New York city, and reside at 1271 Broadway, New York city.

2d Inter. Did you effect a charter for the steamer "Whickham" from New York to Europe after her arrival from Baltimore, in September, 1879? If yea, produce said charter to be filed with the commission, and state all your knowledge of the execution of the same.

Answer. I did effect a charter when the steamer was at Baltimore and had already been refused on a previous charter. On the 13th of Sept. I received a cable message from Newcastle-on-Tyne that the merchants repudiated Whickham's charge on Baltimore, and authorized me to close her for a voyage from Baltimore to Piraeus with grain. On the 15th I received another cable message
53 from Newcastle, reading "Whickham consult Bigelow;" Mr. Bigelow, a broker in Baltimore, was trying to find out which trade she could make the most money in, but he reporting that he could not find a satisfactory trade in Baltimore, I then went to work to see what I could do from this port. On the 16th I made an offer to Newcastle for the Whickham to load in New York. On the 17th I received a cable from Newcastle stating "can't answer before to-morrow," and on the 18th I received another cable from Newcastle accepting the offer as per charter party handed you. I produce the charter which is in my book, and which is marked by the commissioner Ex. A, G. F. B., and I produce a copy of the same, which is marked copy, Exhibit A, G. F. B., commissioner. I signed the original charter by authority from the owners under date of 18th of 9th month of 1879, and Mr. David Bingham signed for his firm of Bingham Bros., in my presence, and in the presence of Andrew J. Ennis, who signed as witness.

54 3rd Inter. Did the "Whickham" sail on that charter; if yea, when and with what cargo; how many quarters did she load, and what was the total amount of freight?

Answer. Yes, sir; she arrived in New York Sept. 21st, from Baltimore, and sailed from New York Sept. 29th, under the charter, with a cargo of 85,005 bushels of wheat, which is equal to 10,625⅝ quarters of 480 pounds, which at the rate of 5 shillings and 6 pence per quarter, as per charter, grosses 2,922 pounds sterling and eleven pence.

4th Inter. How long was the vessel at New York before she was chartered, and was she or not chartered with diligence?

Answer. Never. She was chartered in Baltimore before she arrived here; she was chartered with due diligence and for the very best freight obtainable.

Fifth Inter. What were the expenses, wharfage, port charges, &c., paid by the vessel in New York, and append itemized statements of the same as far as you can?

55 Answer. I append a copy of the disbursement sheet in New York, of which I say that the disbursements mentioned therein are correct.

Paper marked Exhibit B., G. F. B., commissioner.

JOHN C. SEAGER.

Subscribed & sworn to before me, the 17th day of Dec., A. D. 1879.

GEO. F. BETTS,

U. S. Commissioner Southern District of New York.

COPY, EXHIBIT A.—G. F. B., *Commissioner.*

A true copy of the original charter-party in my possession.
JOHN C. SEAGER.

Charter-Party.—Steam. ———.

NEW YORK, 18*th Sept.*, 1879.

It is this day mutually agreed between the owner of the good steamship or vessel called the "Whickham," of London,
56 and classed 100 A 1, of the measurement of 1,735 tons gross, 1,124 tons net, or thereabouts, now in Baltimore, on the one part, and Messrs. Bingham Bros., of New York, merchants, on the other part, that the said steamship, being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, proceed to New York, or so near thereunto as she may safely get, and there shall, always afloat, load from the factors of the said merchants a full and complete cargo of wheat and/or Indian corn in bulk. Ships privilege to load portion of cargo in vessels' bags, vessels capacity guaranteed ten thousand (10,000) quarters of 480 lbs. each, ten per cent. (10 p. ct.), more or less, which they bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, fuel, and furniture; and, being so loaded, shall therewith proceed to Cork, Falmouth, or Plymouth (at master's option) for orders, to be given within 24 hours after ship's arrival or lay days to count, to discharge at a safe port in the United Kingdom of Great Britain and Ireland, or on the continent between Havre and Hamburg (both inclusive),
57 or to a direct port within said limits, or so near thereunto as she may safely get, and deliver the same where the ship can lie always afloat; on being paid freight as follows, if orders given at Cork, Falmouth, or Plymouth, for wheat and/or Indian corn, five shillings & nine pence (5 | 9), Br. st'g, per 480 lbs. delivered; charterers have privilege of ordering steamer, on signing bills of lading, to one safe, direct port on the continent between Bordeaux and Hamburg, but excluding Rouen, in which case rate of freight to be five shillings and nine pence (5 | 9) per 480 lbs. delivered, with three pence less per quarter if ordered to a direct port in the U. K. on signing bills of lading. ten per cent. additional in case if discharged on the Continent, *via* Cork, Falmouth, or Plymouth for orders (the act of God, the queen's enemies, restraint of princes and rulers, fire, and all and every other dangers and accident of the seas, rivers, machinery, and navigation, of whatever nature and kind soever, during the said voyage, always excepted). The freight to be paid on unloading and right delivery of the cargo, say, in cash, without discount or allowance, if in U. K., and in cash at current short sight rate of exchange on London, without discount or allowance, if on the Continent, as above. Seventeen running days are to be
58 allowed the said merchant (if the ship is not sooner dis-

patched) for loading the said ship at port of loading and discharging, inclusive. Should the steamer be ordered to discharge at a port on the continent, as above, where there is not sufficient water for the steamer to enter the first tide after arrival, and to lie always afloat, lay days are to count from 24 hours after arrival off the port, and any lighterage incurred to reach the port of discharge is to be at the risk and expense of the cargo, any customs of the port to the contrary notwithstanding, and 10 days on demurrage over and above the said laying days at 45 pounds per day, payable day by day, it being agreed upon that for the payment of all freight, dead freight, and demurrage the owner shall have an absolute charge and lien on said cargo. The captain to sign bills of lading, at the rate of freight, without prejudice to this charter; but if lower than chartered rate, such difference to be paid in cash at current rate of exchange before signing bill of lading. Cargo to be brought to and taken from alongside the ship at merchant's risk and expense. The vessel to
load under inspection of Captain Vining at ship's expense,
59 also employing elevator, paying usual charges. The vessel to haul for cargo at owner's expense; but if required to move a second time, the cost of second and subsequent towages to be paid by charterers, and the time so consumed to be reckoned as lay days. Lighterage, if any, to be at the risk and expense of the cargo, and time so consumed to be reckoned as lay days. As soon as the cargo is on board the responsibility of the charterer ceases, provided the cargo is equivalent in value to freight, demurrage, &c., at the port of discharge. Penalty for non-performance of this agreement, estimated amount of freight. Steamer to pay usual freight brokerage, and to be entered and cleared in the custom-house by John C. Seager, or his agents. The commission of five per cent. on this charter is due upon signing hereof to John C. Seager.

By authority, 18, 9, '79.

(S'd) JOHN C. SEAGER.
(S'd) BINGHAM BROTHERS.

Signed in presence of—
(S'd) S. VAN PRAAG.
(S'd) A. J. ENNIS.

This is the exhibit referred to by John C. Seager in his examination, as the copy of Exhibit A.

GEO. F. BETTS,
Commissioner.

60 EXHIBIT "B."—G. F. B., *Commissioner.*

63 BEAVER STREET, NEW YORK, *Oct.* 4, 1879.

Br. S. S. "Whickham" in account with John C. Seager, ship broker.

Entry		$2
Pilotage from sea		55 50
Running lines		4
Tow, tug "Babcock"	$25	
" " "Myers"	10	
		35

Delivering grain	$655	30
Bags	305	40
Inspection	10	
Stevedore, stowing bag grain	132	12
Butcher	34	62
Water	22	50
Stores	50	93
Coal	555	75
Doctor	25	
Chronometer	3	
Watching	16	
Advance to sailors	34	
Wharfage: $58.35, $11.67	69	92
Draft Capt. from Baltimore	1,397	23
Clearance at custom-house	8	
" Br. consul	2	90
Petties	2	
61 Cables	42	75
Freight brokerage	212	51
Commission	699	82
Advertising	1	
Cash to captain	61	
Pilotage to sea	106	87
	$4,545	12

This is the Exhibit B referred to by John C. Seager in his examination.

GEO. F. BETTS,
Commissioner.

In witness whereof, I have hereunto set my hand and seal, the 17th day of December, A. D. 1879.

GEO. F. BETTS, [SEAL.]
Commissioner.

Expenses of commission: Libellant, $20.00.

Entries from Log Book, as per Agreement of Counsel on page —.

[NOTE BY PRINTERS.—In the following log the hours without comments attached have been omitted to save space.]

62 *Log of the S. S. Whitcham, from Lisbon to Benisaf, Capt. M. S. Gardiner.*

WEDNESDAY, *July 23rd.*

H.	Courses.	Wind.	Remarks.
2	As required	N. W.	Fine weather at the commencement.
8	----	----	9 a. m., unmoored. Pilot came on board. Proce-ded to sea noon. Over the bar.

H.	Courses.	Wind.	Remarks.
10	----	----	Pilot left.
2	S. by W. ½ W.	----	At 0.45 p. m. Cape Especial, S. E. by E. 5 miles.
4	----	----	Set pat*ent* log and put over.
6	----	----	Hazy middle and latter parts.
10	----	----	11.20 Cape Finister, N. E. about 7 miles.

THURSDAY, *July 24th.*

H.	Courses.	Wind.	Remarks,
2	S. E. ½ E.	East----	A. m., light air and fine weather.
12	S. E.-------	----	Noon, fresh breeze and fine weather. Lat' e, obs. 36 27, acc. 36 26; long., acc. 7 10.
4	----	----	P. M., wind increasing.
8	----	----	9 p. m., Trafalgar east 10 miles.
10	----	----	Blowing a gale.
12	----	----	Midnight, ship not stearing.

63 *Log of the S. S. Whickham, Lisbon to Benizaf, Capt M. S. Gardiner.*

FRIDAY, *July 25th.*

H.	Courses.	Wind.	Remarks.
2	----	East----	Commences with a gale. Ship not stearing.
4	----	----	4 a. m., wind decreasing; ship stearing.
8	E. S. E.----	----	8 Cape Spartell abeam; 4 miles; still fresh breeze.
2	S. E. by E. ½ E.	----	1 p. m., Cueta S. S. W. 6 miles.
4	----	N. E.----	Set pat*ent* log.
8	----	----	8 p. m., light airs, with a strong sea.
12	----	----	Midnight, ditto.

SATURDAY, *July 26th.*

H.	Courses.	Wind.	Remarks.
2	S. E. by E. ½ E.	N.---	Light airs and fine weather throughout.
4	----	----	5 a. m., Cape Tuetan abeam.
12	----	East.	
2	----	----	3 p. m., made Areschgul Island.
4	----	----	4.30, came to an anchor in Banisaf bay. Capt. went ashore and gave notice for Monday.
8	----	----	8 do, set anchor watch.

64 *Log of the S. S. Whickham, from Lisbon to Benisaf, Capt. M. S. Gardiner.*

SUNDAY, *July 27th.*

H.	Courses.	Wind.	Remarks.
2	----	East--	--Fine weather throughout. Ship lying at anchor; waiting for cargo. Received none to-day. Watch set as usual.

Notice at Benisaf.

To Agent Benisaf Mine.

GENTLEMEN: I beg to inform you of the Brittish steamship Whickham, under my command, is now at anchor at Benisaf, and ready to receive her iron ore; therefore my days will commence to-morrow, 28th, first day.

M. S. GARDINER, *Master.*

65 *Log of the S. S. Whickham, lying at Benisaf, Capt. M. S. Gardiner.*

Lat. 35 16 North, Long. 1 20.

MONDAY, *July 28th, '79.*

H.	Courses.	Wind.	Remarks.
2	----	E. S. E. --	First and middle parts; fine latter.
6	----	----	6 a. m. commenced taking in iron ore; took in 23 boats at about 5 tons each; ship's lay days commences; crew emploi-d scraping ship outside and painting bare places.
8	----	----	Latter part hazy; watch set at 8 p. m.

TUESDAY, *July 29th.*

H.	Courses.	Wind.	Remarks.
2	----	West ----	This day commences with hazy weather.
8	----	----	Ship taking in cargo; took 18 boats of ore in.
12	----	----	This is the second lay day.
2	----	W. S. W.-	Crew emploi-d washing and painting masts and yards; p. m. finishes fine weather.
8	----	----	8 p. m. watch set.

66 *Log of the S. S. Whickham, lying at Benisaf, Capt. M. S. Gardiner.*

WEDNESDAY, *July 30th.*

H.	Courses.	Wind.	Remarks.
2	----	West ----	A. M. commences with fine weather.
8	----	----	No cargo taking in to-day.
12	----	W. S. W.-	Crew employed covering steam pipes and painting funnel.
4	----	----	Third lay day expired.
6	----	----	Painting chain gear and stenchions.
8	----	----	Watch set at 8 p. m.; latter part ditto weather.

THURSDAY, *July 31st.*

2	----	W. S. W.-	This day commences with hot, sultry weather.
8	----	----	Crew employed scraping and painting arm in stenchions and various other jobs.
2	----	Variable -	Ship's fourth lay day.
4	----	----	5 p. m. commenced to put in cargo, and did 4 boats.
8	----	Calm.	
10	----	----	Ditto weather latter part.
12	----	----	Watch set as usual.

67 *Log of the S. S. Whickham, lying at Benisaf, Capt. M. S. Gardiner.*

FRIDAY, *August 1st*, '79.

H.	Courses.	Wind.	Remarks.
2	----	East----	Fresh breeze at times.
6	----	----	Crew employed fitting new running gear, overhauling blocks, painting various places.
12	----	E. N. E.	
2	----	----	This is the fifth lay day for ship.
8	----	N. W. ---	Took in 22 boats of ore.
10	----	----	Watch set as usual.

SATURDAY, *August 2nd*, '79.

H.	Courses.	Wind.	Remarks.
2	----	Variable -	Light airs and calms.
6	----	----	Ship taking in cargo; took in 21 boats of ore.
10	----	----	Ship's sixth lay day.
12	----	Calms.	

H.	Courses.	Wind.	Remarks.
2	----	----	Crew employed washing and painting boat's bridge and stuffing topgallant forecastle deck.
10	----	S. S. W.--	Anchor watch set at 8 p. m.
12	----	----	Land breeze at midnight.

68 *Log of the S. S. Whickham, lying at Benisaf, Capt. M. S. Gardiner.*

SUNDAY, *Aug'st 3rd*, '79.

H.	Courses.	Wind.	Remarks.
2	----	East----	Commences with hazy weather.
6	----	----	Ship taking in cargo; took in 22 boats of iron ore.
10	----	----	Noon sultry and calm.
12	----	Calm ----	Ship's lay days, Sundays excepted. As the merchant wish'd to work, this counts the seventh day. No work by crew, being the Sabbath.
10	----	N. W.----	Watch set as usual.
12	----	----	Midnight fine.

MONDAY, *Aug'st 4th*, '79.

H.	Courses.	Wind.	Remarks.
2	----	E. S. E. --	Begins with fine weather.
6	----	----	Took in 77 boats of iron ore and counts ships.
10	----	----	Eighth lay day.
12	----	Variable.	
2	----	----	Crew employ'd chipping ship's outside, painting bridge, and various other jobs.
8	----	----	8 p. m., set anchor watch.
12	----	Calm ----	Midnight calm.

69 Morrocco Coast.

Log of the S. S. Whickham, lying at Benisaf, Capt. M. S. Gardiner.

TUESDAY, *August 5th*, '79.

H.	Courses.	Wind.	Remarks.
2	----	N. W.----	This 24 hours fine weather.
6	----	----	Ship taking in cargo; took in 97 boats of ore.
12	----	----	Ships ninth lay day.
4	----	----	Crew emploi-d chip-ing after-peak, and securing planks in holds, also painting and chip-ing hull outside.
8	----	----	Watch set at 8 p. m.
10	----	S. S. W.	

WEDNESDAY, *Aug'st 6th*, '79.

H.	Courses.	Wind.	Remarks.
2	----	N. W.----	Fine weather throughout; took in 80 boats; ship's tenth and last lay day; notice given to the agent of Benisaf mine.
			GENTLEMEN: I beg to give notice that to-day is the last lay day, and to-morrow will be the first day on demurrage, for which I claim £24. M. S. GARDINER, *Master*.
2	----	Calm.	
8	----	----	8 p. m., watch set.
10	----	----	Crew trimming cargo and painting outlockers.

70 *Log of the S. S. Whickham, lying at Benisaf, Capt M. S. Gardiner.*

THURSDAY, *Aug'st 7th*, '79.

H.	Courses.	Wind.	Remarks.
2	----	Calms----	Light airs and hot, sultry weather.
4	----	----	Took in 57 boats and finished cargo at 5.30 p. m.
10	----	----	Crew trimming and securing cargo.
12	----	----	Ship's first day on demur-age at £24.
4	----	N. N. W.--	5.30 all load.; 21 2 aft., forward 19 10.
6	N. W.----	----	6 p. m. weigh'd anchor.
8	----	----	8.20, Areschgul Island S. E. 6 miles.
10	N. W. by W.--	----	Set P. log.
12	----	----	Midnight fine.

FRIDAY, *Aug'st 8th*.

H.	Courses.	Wind.	Remarks.
2	N. W. by W.--	Calms----	Hot, sultry weather and calms.
12	----	----	Lat*t*., obs. 35° 54′, acc. 35° 51′; long. 4° 9′ W.
2	----	E. S.E.	
4	----	----	P. M. hasy, with light airs.
6	----	----	10 do. Europa Point W. N.W.
8	----	----	12 miles; eas'd ship down slow.
12	----	Av'*d*ge on for day-light ---	Midnight calm.

71 *Log of the S. S. Whickham, from Benisaf towards Philadelphia Capt. M. S. Gardiner.*

SATURDAY, *Aug'st 9th*, 1879.

H.	Courses.	Wind.	Remarks.
2	As required.	East.	Fine weather.
4	----	----	At 5 a. m. set engines away full speed.
6	----	----	7 do., went alongside of No. 5 coal hulk, Gibralter and took in 45 tons of coal.
2	----	E. S. E.	Noon, all cleared; cast loose from the hulk and proceeded.
			3 p. m., abreast of Terifa.
4	----	----	5.15, Cape Spartell abeam; set pat-tant log.
6	W. by N. ½ N.		
12	----	West ----	Midnight fine.

SUNDAY, *Aug'st 10th*, '79.

H.	Courses.	Wind.	Remarks.
2	W. by N. ½ N.	West ----	Fine weather; wind variable.
6	----	----	Sail set when required.
10	----	North.	
12	----	----	Latt., obs. 35 21 m., acc't 35 23 m.; long., acc. 8 52 W.
2	----	----	Dist. run by log 141 miles.
4	----	West ----	P. M. cloudy, with a shower of rain.
10	----	South.	
12	----	----	Midnight do.

72 *Log of the S. S. Whickham, from Benisaf towards Philadelphia, Capt. M. S. Gardiner.*

MONDAY, *Aug'st 11th*, '79.

H.	Courses.	Wind.	Remarks.
2	W. by N. ½ N.	W. N. W.	Fresh breeze, with cloudy weather.
4	W. by N.		
12	----	North ---	Latt., obs. 34 59, acc. 35 2; long. 12 45.
2	----	West ----	Dist. run by log, 193 miles.
6	W. by N. ½ N.	S. W. ----	P. M., shower of rain.
12	----	----	Midnight, fresh breeze; strong head sea.

TUESDAY, *Aug'st 12th*.

H.	Courses.	Wind.	Remarks.
2	W. by N. ½ N.	N. W.	Fresh breeze, with strong head sea.
8	----	----	Passing showers at times.
12	----	----	Lat'e, obs. 34 44, acc. 34 43; long., 16 12.
2	----	----	Dist. run by log, 172 miles.
6	----	----	P. M., sea abeam; cargo settled down into low-r hold; ship rol-ing heavy.
12	----	----	Midnight, heavy weather.

73 WEDNESDAY, *Aug'st 13th*, '79.

H.	Courses.	Wind.	Remarks.
2	W. by N. ¼ --	North ---	Strong beam sea, wind decreesing, cargo hove to leeward.
6	----	N. N.W.--	Commenced and trim'd ship up right.
12	----	----	Lat'e, obs. 34 31, acc't 34 31; long. acc't, 19 52.
2	W. N.W.---	----	Dist. run by log, 183 miles.
4	----	----	P. M., light airs, strong beam sea.
6	----	N.W.	
8	----	----	P. M., showers of rain.
12	----	----	Midnight, fine.

THURSDAY, *Aug'st 14th.*

H.	Courses.	Wind.	Remarks.
2	W. N.W.---	North ---	Fine weather throughout and smooth water.
8	----	N. N.E.--	All sails set.
12	N.W. by W. ½ W.	----	Lati., 34 40, acc't 34 40; long., 23 32.
2	----	----	Dist. run, 181 miles.
12	----	----	Midnight, hazy; wind falling light.

74 *Log of the S. S. Whickham, from Benisaf towards Philadelphia, Capt. M. S. Gardiner*

FRIDAY, *Aug'st 15th.*

H.	Courses.	Wind.	Remarks.
2	N.W. by W. ½ W.	North ---	Clear, fine weather; wind light and variable.
4	----	N. N.E.	
8	----	----	All sails set to best advantage.
12	----	N.E.----	Lati., obs. 34 56 north, acc't 34 59 north; long., 27 33 W.
2	W. N.W.---	----	Dist. run by log, 193 miles.
4	----	North---	P. M., light breeze; all sails set.
12	----	Calm ---	Midnight, calm; furl'd sails 2¼ variation.

SATURDAY, *Aug'st 16th.*

H.	Courses.	Wind.	Remarks.
2	W. N.W.---	Calm ---	A. M., calm and fine clear weather.
6	----	North---	8 do., fore and aft sails set.
8	----	N. N.E. --	Light variable winds.
12	----	----	Lati., obs., 35 10; lati. acc't, 35 9; long., 31–30.

H.	Courses.	Wind.	Remarks.
2	----	----	Dist. run by log, 195 miles.
4	----	North----	4 p. m., spoke ship County of Pebles, of Glasgow, from Migillones Bay, bound to Liverpool, 76 days out.
10	----	N.W.----	Lati., 35 12; long. by chron., 32 50.
12	----	----	Midnight, light airs and calms.

75 SUNDAY, *Aug'st 17th*, '79.

H.	Courses.	Wind.	Remarks.
2	W. N. W.---	Calm----	Light airs and calms for most part. 4 a. m., pas'd steamboat bound east and several sailing vessels.
10	----	S. W.	
12	----	----	Lati., 35 23, acc't 35 20; long. acc't, 35 32.
2	----	----	Dist. run by log, 198 miles.
4	----	S. W.----	4 p. m., spoke Amana, of Glascow, from Bisain for London, 104 days.
8	----	----	Lati., 35 23; long., 37 10, chronometer.
12	----	----	Midnight, light airs and cloudy.

MONDAY, *Aug'st 18th*, '79.

H.	Courses.	Wind.	Remarks.
2	W. N. W.---	West----	This day commences with light breeze and cloudy weather.
8	----	W. by S.--	8 a. m., wind increasing.
12	----	----	Lati., obs. 35 34, acc't 35 32; long., 39 27.
2	----	----	183 miles run.
4	----	West----	P. M., fresh breeze and sea rising.
12	----	----	Midnight, do. weather.

76 *Log of the S. S. Whickham, from Benisaf towards Philadelphia, Capt. M. S. Gardiner.*

TUESDAY, *Aug'st 19th.*

H.	Courses.	Wind.	Remarks.
2	----	West----	A. M., wind decreesing, with showers of rain.
4	N. W. by W. ½ W.		
8	----	North----	8 do., fine, fore and aft sails set.
12	----	----	Lati., obs. 35 38, acc't 35 41; long., 42 37.
2	----	----	Dist. run, 153 miles.
4	----	----	P. M., fine weather.
6	----	N. W.----	6 sails in, wind moderate, sea smooth.
12	N. W. by W. ½ W.	West----	Midnight, fine.

WEDNESDAY, *Aug'st 20th.*

H.	Courses.	Wind.	Remarks.
5	----	----	Fine weather throughout.
4	----	South----	Sea smooth.
6	----	----	Fore and aft sails set.
8	----	S. W. ----	Coated decks with oil & tar.
10	----	----	Variation, $2\frac{3}{4}$ points.
12	N. W. by W. $\frac{1}{2}$ W.	----	Lati., obs. 35 43; do. acc't, 35 47; long., 46 26.
2	----	----	Dist. run, 185 miles.
6	----	West----	Sails in wind drawing ahead.
12	----	----	Midnight, cloudy.

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THURSDAY, *Aug'st 21st.*

H.	Courses.	Wind.	Remarks.
2	----	S. W. ----	Moderate breeze and cloudy weather.
6	----	----	Fore and aft sails set.
8	----	----	Small drizzeling rain.
10	N.W. by W. $\frac{1}{2}$ W.		
12	----	----	Lati., obs. 36 12, acc't 35 8; long., 49 59.
2	W. N. W.----------		Dist. run by log, 174 miles.
4	----	W. N. W.-	3 p. m., heavy shower of rain in fore and aft sails, wind westward.
10	----	----	$1\frac{3}{4}$ vari.
12	----	----	Midnight, moderate breeze.

FRIDAY, *Aug'st 22nd.*

H.	Courses.	Wind.	Remarks.
2	W. N. W.---	W. N. W.-	A. M., cloudy, with a passing shower.
4	----	----	Moderate breeze.
6	----	West ----	Sea smooth.
12	----	----	Lati., obs. 36° 18′, acc't 36° 20′; long., 53° 24′.
2	N. W. by W. $\frac{3}{4}$ W.		Dist. run, 166 miles.
6	----	----	P. M., ditto weather.
8	----	W. S. W.	

78 *Logs of the S. S. Whickham from Benisaf towards Philadelphia, Capt. M. S. Gardiner.*

SATURDAY, *Aug'st 23.*

H.	Courses.	Wind.	Remarks.
2	W. N. W.--	W. -----	First and middle part fine; latter hazy, with drops of rain.
6	----	W. S. W.	
10	----	S. W.----	Fore and aft sails set.

H.	Courses.	Wind.	Remarks.
12	----	----	Lati., obs. 36 33, acc't 33 32; long., 59 29.
2	----	----	Dist. run, 189 miles.
4	N. W. by W. $\frac{3}{4}$ W.	----	$1\frac{3}{4}$.
6	----	----	P. M., unbent and bent another fore try-sail.
10	W. N. W. --	W. S. W	

SUNDAY, *Aug'st 24th.*

H.	Courses.	Wind.	Remarks.
2	W. N. W. --	S. W. by W.	Moderate breeze and hazy weather, with *acaitionly* heavy showers of rain; wind variable; fore and aft sails set.
8	----	S. W.	
12	----	----	Lati., obs. 37 5 acc't, 37 3; long., 63 38.
2	W., N. W.--	----	Dist. run, 200 miles. $1\frac{1}{2}$.
6	----	----	P. M., hazy, with fine breeze.
8	----	S. W. -----	*Four*-top-sail set.
12	----	----	Midnight, showery.

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MONDAY, *Aug'st 25th.*

H.	Courses.	Wind.	Remarks.
2	W. N. W.	W. S. W.	A. M., fresh breeze and cloudy weather.
6	----	----	Fore and aft sails set.
10	----	----	Took in low'r topsail.
12	----	----	Lati., obs. 37 40, acc't 37 41; 67 37 long.
2	----	----	Distance run, 152 miles, $\frac{3}{4}$ varia.
6	----	----	P. M., do. weather.
12	----	----	Midnight, showers of rain.

TUESDAY, *Aug'st 26th.*

H.	Courses.	Wind.	Remarks.
2	W. N. W.	W. S. W.	This day commences with cloudy weather, with showers of rain.
10	----	----	Sun obscured.
12	----	----	Lati. acc't, 38° 15′; long. acc't, 70° 36′.
2	----	----	Dist. run, 145 miles.
4	----	----	P. M., heavy showers of rain.
6	----	----	All sails in; sea smooth.
12	----	----	Midnight, breeze increesing.

80 *Log of the S. S. Whickham, from Benisaf towards Philadelphia, Capt. M. S. Gardiner.*

WEDNESDAY, *Aug'st 27th.*

H.	Courses.	Wind.	Remarks.
2	W. by N.	S. W.	Fresh breeze, variable with heavy showers of rain.
12	----	----	Noon; sun obscured. Lati. acc't, ——; long., ——.
2	----	W. S. W.	
4	----	N. E.	P. M., wind changed into the N. E.
6	----	----	Fresh breeze, with a beam sea.
8	----	----	8 p. m., cast of the lead; no bottom.
12	----	----	Midnight, wind decreesing, but heavy rain.

THURSDAY, *Aug'st 28th.*

H.	Courses.	Wind.	Remarks.
2	W. by N.	N. E.	Moderate breeze and thick, hazy weather. 2 a. m., took a cast of the lead; 60 fathoms; laid ship too until daylight. 4 a. m., kept ship away; still thick, hazy rain. Noon,
2	As required.		made the land at 1 p. m.; Cape Henlopen ahead; 2, got pilot, and proceeded up the river; 7, came to an anchor in 5 fathoms; set the anchor watch.
12	----	----	Midnight, fine weather.

81 FRIDAY, *Aug'st 29th.*

H.	Courses.	Wind.	Remarks.
2	As required.	N. E.	Fine weather throughout.
4	----	----	4 a. m., weigh'd anchor and proceeded up the river.
12	----	----	Pilot boat No. 2 and No. 4, noon, signaled of- Newcastle.
			1 p. m., past the quarintine station.
2	At anchor.	North.	3.30 do., came to an anchor in the river off Gloucester. Pilot left ship.
8		----	8 p. m., anchor watch set.
12		----	Midnight, fine weather.

SATURDAY, *Aug'st 30th*, '79.

H.	Courses.	Wind.	Remarks.
2	----	E. S. E.	This day commences with fine weather, ship lying waiting for a quay berth to discharge.

H.	Courses.	Wind.	Remarks.
10	----	----	Notice sent into merchants ship was ready to discharge.
12	At anchor.	----	Noon, fine.
4		----	Crew employ-d washing and cleaning ship and painting funnel and ventilators.
8	----	E. S. E.	8 p. m., watch set as usual.
12	----	----	Midnight, ditto weather.

82 *Log of the S. S. Whickham, lying at Anchor in Delaware, Philadelphia, Capt M. S. Gardiner.*

SUNDAY, *Aug'st* 31*st*.

H.	Courses.	Wind.	Remarks.
2	----	N. W.	Throughout this 24 hours fine, clear weather, with light airs and calms.
10	----	Calms.	
12	----	----	No work done to-day, being the Sabbath.
6	----	Variable.	Ship lying at anchor at Gloucester, Philadelphia.
8	----	----	At 8, watch set.
12	----	West.	

MONDAY, *September* 1*st*.

H.	Courses.	Wind.	Remarks.
2	----	W. S. W.	A. M., fine dry weather; crew employed painting boats and all chain work.
10	----	S. W.	This counts ship's first lay day; no berth.
4	----	----	P. M., hot, sultry weather.
6	----	Easterly.	
8	----	----	Watch set as usual at 8 p. m.
12	----	----	Midnight, fine.

83 TUESDAY, *September* 2*nd*.

H.	Courses.	Wind.	Remarks.
2	----	East	This day commences with fine dry weather.
10	----	S. E.	3 a. m. two steam-tugs came and tow'd ship up to Reed's wharf and moored.
12	----	----	Rig'd gear and commenced cargo at ——, their being no trucks down before. Ship's second lay day.

H.	Courses.	Wind.	Remarks.
6	----	----	7.20, watchman came from the shore; two of the crew at wenches working all night.
8	----	South.	
12	----	----	Midnight, hazy.

WEDNESDAY, *September 3rd.*

H.	Courses.	Wind.	Remarks.
2	----	S. W. ----	First and middle parts drizzl/ing rain, latter hazy; discharging cargo into trucks; stop-d by them from 12 to 3 p. m. Crew scrubbing ship outside and repairing sails.
10	----	S. W.	
12	----	----	This is the third lay day for ship; two of crew at wenches.
4	----	South ---	Watchman from the shore; work'd all night.

84 *Log of the S. S. Whickham, lying at Philadelphia, Capt. M. S. Gardiner.*

THURSDAY, *Sept. 4th*, '79.

H.	Courses.	Wind.	Remarks.
2	----	West ----	Fine dry weather this 24 hours.
6	----	----	Ship discharging cargo night and day.
10	----	W. N. W.	Crew attending winches as required. Ship's fourth day. Remainder of crew repairing sails and chip-ing and cleaning ship outside. Watchman from shore.

FRIDAY, *Sept. 5th.*

H.	Courses.	Wind.	Remarks.
2	----	W. N. W.	This day commences with fine weather.
6	----		Ship discharging cargo.
12	----		Ship's fifth lay day.
2	----		Two foreman deserted; se, official; crew emploid cleaning hould and chip-ing and painting outside.
8	----	----	Watchman from the shore.

85 SATURDAY, *Sept. 6th.*

H.	Courses.	Wind.	Remarks.
2	----	S.S.E----	Fine weather throughout.
4	----	----	5 a. m. cargo all out; put out 171 trucks of ore, weighing about 12 tons each.
2	----	----	This is the sixth lay day.
6	----	----	Crew scrubbing ship outside and making ready for sea.
12	----	----	Watchman from the shore. Whickham towards Baltimore.

SUNDAY, *Sept. 7th*, '79.

H.	Courses.	Wind.	Remarks.
2	----	----	A. M. hazy.
4	----	----	5 do. pilot came and took ship off the wharf; also steam-tug. 5.30 all clear; proceeded down the river.
12	----	----	Noon, clear.
4	S.E. by S. --	S.E.------	4.30 pilot left ship.
8	----	----	Henlopen SW. by W. 1 mile.
10	----	----	Set P. log.
12	----	----	Midnight, fresh breeze.

86 *Log of S. S. Whickham from Philadelphia towards Baltimore.*

MONDAY, *Sept. 8th.*

H.	Courses.	Wind.	Remarks.
2	S.S.W.-----	S.S.E----	This day commences with fine weather. 2 a. m. winter quarter light.
8	S.W.-------	South----	Vessel abeam 5 miles.
12	----	----	Noon, pilot came on board.
2	----	S.W.-----	Cape Henry abeam 5 miles.
6	As required.	----	Proceeded up the Chesapeake.
8	----	----	P. M., fresh gale.
12	----	----	Midnight came to an achor of- Core Point. Pilot's boat, fore and aft rig'd, 2 masts.

TUESDAY, *Sept. 9th.*

H.	Courses.	Wind.	Remarks.
2	As required.	S.W.-----	A. M. fresh breeze and clear weather.
4	----	----	5 do. weigh'd anchor and proceeded.
12	----	West ----	Noon, came to an anchor off Canton elevator No. 2. Pilot left ship 5 p. m. Harbor master ordered ship to move more into anchorage; 6, shifted.
8	----	----	8 p. m. set anchor watch.
12	----	----	Midnight, fine weather.

87 *Opinion of District Judge. Filed 6th March*, 1880.

In the U. S. District Court for Md.

GEORGE A. VON LINGEN & CARL A. VON LINGEN, trading as A. SCHUMACHER & Co.,
against
T. H. DAVIDSON & others.

T. H. DAVIDSON
vs.
GEORGE A. VON LINGEN & Co., trading as A. SCHUMACHER & Co.

} Cross-Libels.

These are cross-libels filed by the charterers and owners of the British steamer "Whickham."

The British steamer "Whickham," belonging to T. H. Davidson & others, citizens of Great Britain, as appears from her log-book, sailed from Shields on July 9th, 1879, with a cargo for Lisbon, arriving there on July 16th; she discharged her cargo and sailed
88 thence in ballast on July 23d for Benizaf, on the coast of Morocco, under charter for a cargo of iron ore. She passed through the Straits of Gibralta- on July 25th, and at 4.30 p. m., on Saturday, July 26th, came to anchor in Benizaf Bay. On Monday, July 28th, she began taking in her cargo of iron ore, and continued taking it in from day to day, and finished at 5.30 p. m. on Aug. 7th; got under way at 6.30 p. m. and sailed for Philadelphia. She stopped some five hours at Gibralta- on Aug. 9th for coal, and, taking in 45 tons of coal, had a prosperous voyage, arriving at Philadelphia on Sept. 2nd.

Messrs. Gregg & Co., ship-brokers, of Philadelphia, were, about August 1st, authorized by cable message from the owners in England to procure for the "Whickham" a charter to carry grain from the United States on her return voyage, and they, not finding a desirable charter for her in Philadelphia, authorized Mr. Eareckson, a ship broker in Baltimore, to look for a charter for her in this city.

Mr. Eareckson's authority was by telegraph, and represented the vessel as sailed "or about to sail" from Benizaf.

89 Mess. Schumacher & Co., of Baltimore, being under contract to ship a large cargo of grain by steamer during the month of August, had employed Mr. Ford, of Baltimore, a ship broker, to procure for them a suitable steamer, and he finding steamers for August very scarce, and hearing of the "Whickham," took Mr. Eareckson to the office of Schumacher & Co., and suggested that the "Whickham" would answer their purpose.

Schumacher & Co. doubted if the steamer would arrive in time, and explained that unless they could load and clear the vessel within the month of August she would be of no use whatever to them.

Mr. Eareckson, however, made a calculation to show that the steamer would arrive in time, and Schumacher & Co. agreed to take her. This was on August 1st.

A charter party was prepared by Mess. Gregg & Co., of Philadelphia, and signed on behalf of the owners and sent to S. & Co.; but they refused it, as it contained the words "sailed or loading at Benizaf," which they claimed was not the agreement. Another charter party was then executed by Gregg & Co., containing the words "sailed or about to sail from Benizaf," which was
90 accepted and signed by S. & Co., and that is the contract under which this controversy arises.

It appears that during the negotiation, S. & Co. endeavored to get a stipulation inserted in the charter-party that the vessel would arrive in time for the August shipment, but that was refused. It also appears that in the printed charter-party used there was a stipulation in this language: "Charterers to have the option of cancelling this charter party should vessel not have arrived at loading port prior to ——." This was erased by drawing a pen through it. The portions of the charter party material to this litigation were as follows:

"PHILADELPHIA, *Aug.* 1*st*, 1879.

"It is this day mutually agreed between T. H. Davidson, Esq., owner of the Br. steamship 'Whickham," of London, built 1876, at Newcastle, of 1,124 net tons register, or thereabouts, classed 100 A 1 in Br. Lloyd's, now sailed or about to sail from Benizaf with cargo for Phila., and Mess. A. Schumacher & Co.—

"That said steamship, being tight, staunch, and strong, and in every way fitted for the voyage, with liberty to take outward cargo to Phila. for owner's benefit, shall, with all convenient speed,
91 sail and proceed to Phila. or Balt., at charterer's option, after discharge of inward cargo at Phila., & there load from said charterers or their agents a full and complete cargo of grain, &c., &c.," and being so loaded shall therewith proceed to Queenstown, Falmouth, or Plymouth for orders to discharge at a safe port in the United Kingdom, &c., and deliver the same, on being paid freight six shillings and three pence sterling per quarter of 480 lbs., &c., in full of port charges, &c., (the acts of God, restraints of princes and rulers, the dangers of the seas and navigation, accidents to boilers, machinery, etc., always excepted.) Fifteen running days, (if vessel not sooner dispatched,) commencing when vessel is all ready & prepared to receive cargo, and written notice thereof given to charterers, to be allowed for loading and discharging vessel, and if longer detained charterers to pay demurrage at the rate of forty pounds British sterling or its equivalent per day.

Penalty for non-performance of this agreement, estimated amount of freight.

It further appears from the testimony that on the 8th day of August, S. & Co. having become uneasy about the "Whick-
92 ham," got Gregg & Co. to send a cable message to the owners for information, and on the 9th day of August, learning that she had just that day passed Gibralta, they concluded that she would not arrive in time for their purpose, and determined to look for another vessel, and on the 16th August chartered another steamer

at an advance of nine pence a quarter, she being the only other steamer which could be obtained suitable for their purpose.

The "Whickham" arriving in Philadelphia on Sept. 2nd, discharged her cargo of iron ore with dispatch and sailed for Baltimore on the 7th, arrived in Balt. on the 9th, where she was tendered to S. & Co. on Sept. 11th. S. & Co. refused to load her, and filed their libel *in personam* against the owners for their damages, in being obliged to charter another vessel at a higher rate, alleging that the "Whickham" at the date of the charter party had not sailed, nor was she about to sail, from Benizaf, and that by reason of the breach in said contract and warranty, and the delay in the arrival of the steamer at Philadelphia arising therefrom, they were not
93 afforded an opportunity of loading said steamer with grain, either in Phila. or Balt., during the month of August, whereby they had sustained $2,000 damages.

The owners of the "Whickham" answered and also filed their cross-libel, alleging that on the day of the date of said charter the steamer *was* about to sail from Benizaf, and did proceed, with all convenient speed, to Philadelphia, and having discharged her inward cargo did, in accordance with said charter, proceed to Baltimore, and was ready to receive cargo from the charterers, (of which written notice was given to them,) but that the charterers had, without cause, repudiated the charter and refused to load said vessel. That said steamer, as soon as possible after said refusal, was rechartered at the risk of said charterers at the best rate that could be had, and that finding that a better charter could be obtained in New York than elsewhere, she took a charter from that port at a loss in freight of $1,912.58, and that she lost by the increased expenses and loss of time and expenses at New York, $1,000 additional, so that the whole loss of the owners was upwards of $3,000.

94 Obviously the solution of this controversy, involving so considerable a loss to both parties, depends upon the interpretation of the words "about to sail from Benizaf, with cargo, for Phila."

It is claimed that in interpreting the meaning of these words the court is to give weight to the facts stated by the charterers in the negotiations preceding the signing of the charter party, and particularly to the fact then made known by S. & Co. to the agent of the owners, that unless the steamer arrived in time for the August shipment the object they had in chartering the vessel would be entirely frustrated. That time was to them of the very essence of the whole contract, as they understood it, and that this they fully explained to the agent of the owners. And as by reason of the non-arrival of the steamer during August their object was frustrated, the court should put upon the words "about to sail" a stricter interpretation than in a case where, notwithstanding the non-arrival of a vessel within the expected time, the purposes of the charter might still be practicable.

95 This doctrine is fully considered by the Supreme Court of the U. S., case of Lober *vs.* Bangs, (2 Wallace, 736,) and the conclusion announced by the majority of the Court is, that the frus-

tration of the purposes of the charterers cannot affect the construction of the contract, but that the contract is to be construed with reference to the intention of the parties at the time it is made without reference to subsequent events, the intention of the parties being derived from the language of the instrument; and that when the meaning of the language is not clear the Court is to construe it in the light of the circumstances surrounding the parties when the contract was made.

With regard to the facts of this case, although it does not appear distinctly in the testimony, it was stated in argument, and seems to be a conceded and generally known fact that Benizaf is a loading place on the coast of Morocco, about 24 hours by steamer from Gibralta, from whence is shipped iron ore. It is not a port or harbor, but simply a convenient loading place for shipping the iron ore mined in that vicinity. It is not unfair, therefore, to presume
96 that any one contracting with regard to a vessel at Benizaf knew for what purpose she was there and the nature of the cargo she was there to take in. And when S. & Co. negotiated and contracted with regrrd to a steamer about to sail from Benizaf with cargo, they must be presumed to have known that she was there taking in a cargo of iron ore in the usual manner in which cargo is taken in at that place.

There is no proof of any usage among shipowners & charterers by which any peculiar meaning is given to the words used in the charter. There is no proof, indeed, as to what period of time the charterers themselves, when making the contract, thought the words "about to sail" should cover.

For the purposes of this contract I think the court must take the words themselves and determine their meaning with reference to such a vessel as the "Whickham" when at Benizaf, under the circumstances as known to both parties.

The words "about to sail" had reference, primarily, to the steamer's leaving Benizaf and indirectly only to the time of her arriving in Phila. And it is to the circumstances surrounding her at
97 Benizaf that we are to look for light, and not to the expectations of the charterers as to her arrival at Philadelphia. The words used in the contract were the words which it was known to all the parties the agent of the owners was authorized by them to use, and it is plain that the necessity of the charterers to have the steamer in time for their August shipment of grain cannot affect the meaning to be given to the language.

It is apparent that the words "about to sail from Benizaf with cargo" must have been understood to cover some period of time. It would not be reasonable to suppose the charterers even thought they meant that the ship had all her cargo on board and was weighing anchor or getting up steam, or was in any such state of forwardness as that she could leave Benizaf within an hour or two.

It is not reasonable to suppose that the owners were willing to bind themselves with regard to a vessel in so remote and inaccessible a place to such a point of time. It must, I think, have been

understood by the charterers that some delay in the departure of the vessel was covered by the language.

98 As Gibralta appears to be the nearest point of telegraphic communication, neither the owners nor charterers could know anything of the "Whickham," except that she passed in through the straits of Gibralta on July 25th. It was to be presumed on August 1st that she had reached Benizaf, and had been there five days, and therefore had either sailed for Phila. or was about to sail as soon as she got her cargo on board, which was the only thing to detain her.

As matter of fact, she had for two days been receiving cargo. She was ready to receive it on Sunday, July 27th, but received none on that day. On Monday, 28th, she did take in about 115 tons, and on Tuesday, July 29th, about 90 tons; on the 30th she received none, and 31st only four boat loads.

The process of loading at Benizaf is proved to be that the vessel lies at anchor about a quarter of a mile from the coast, in the roads. Small boats, carrying from 5 to 7 tons each, come alongside, and the ore is passed up the ship's side in small baskets of about 15 to the ton. There are two or three stages from the boats to the ship's decks, and two men at each stage receiving and passing the baskets.

99 It is proved that there were two gangs of men on each side of four hatches, so that there were about 8 boats alongside at one time unloading into the ship.

The ship's officers swear that the cargo was taken in with diligence and despatch; that at first there was some delay, resulting from there being two other steamers ahead of them who had the right to be first loaded, and for the first three days the "Whickham" was more or less interfered with, and the witnesses testify that the delay in all may have resulted in a loss of about two days' time.

They state that the "Whickham" had steam up for several hours before the loading was completed, and that she sailed within an hour and half after the last basket of ore was taken on board.

What do these facts show with regard to the surroundings of the steamer at the date of the charter, and what assistance do they afford us in getting at the meaning of the statement that the steamer was then "about to sail from Benizaf with cargo for Phila."?

They show that the steamer was to bring the usual cargo

100 from that place, and that it was being put on board in the usual manner; that she had been at the place five days. They show that she had not then sailed, because she had not completed taking in her cargo, but that she did complete taking in her cargo with reasonable diligence, and, being in every respect fitted for the voyage, did, as soon as her cargo was on board, proceed with all convenient speed to Phila.

Either I must hold that "about to sail with cargo" meant that the steamer had her cargo all on board, and had nothing left to be done but to get up her anchor & start, which is an unreasonable and strained interpretation of such words in a contract with reference to a vessel in so remote a place, or I must hold that they meant that she would sail in 12 hours or in 24 or 48 hours, or some

other definite time after the signing of the charter party, which would be making for the contracting parties a contract which they did not themselves make; or I must look at the known employment of the steamer at the date of the contract, and hold that the words meant that as loading her cargo was the only thing which could be supposed to be detaining her at that place, she was
101 to sail as soon as, with reasonable diligence, she could get her cargo on board; and this, I am of opinion, is the proper interpretation of the contract.

The word "about" can only be construed with reference to the subject matter & circumstances with regard to which it is used; it has a more uncertain meaning that the words "almost," "nearly," "well-nigh," and unless I adopt the method last-above indicated, I think we are entirely without any guide in ascertaining its meaning, as used in this charter, and what was the intention of the parties expressed by it. It plainly appears from the contract that the charterers took a great many risks in respect to the steamer's arriving in time for their purpose, which they would not have taken if they could have obtained the stipulation which they tried to get from the owners, but could not, viz.: a stipulation that they were to be released if the steamer did not arrive in time for the August shipment. They were refused that stipulation, and they took the charter without it, and assumed all the risks of her non-arrival by reason of the weather & the accidents of navigation, which always rest upon the charterer, unless there is a stipulation that the vessel shall arrive by a particular day.

102 There are in the reports numerous decisions in which long delays, even extending to one and two years, arising from embargoes or perils of the sea, have been held not to absolve the charterer from loading the vessel when finally tendered.

There is no argument therefore to be adduced from the alleged hardship of the case. In dealing with contracts with regard to vessels there must frequently be great losses arising from delays for which neither owner nor charterer is to blame; upon whom that loss must fall must be determined by the contract, and, as was said in Dimech *vs.* Cortlett (12 Moore's Privy Council Cases, page 228), "if the parties have not expressly stated for themselves in the charter party that unless the vessel sailed by a specified day the charter party should be at an end, the court ought to be slow to make such a stipulation for them."

I have examined with care the decisions which were cited by counsel, but I have not been able to find that in any case at
103 all similar to the one under consideration, and in which no particular day or period of time was stipulated for the sailing or the arrival of the vessel, the charterer was held to be absolved.

It was also urged on behalf of S. & Co. that as the charter party represented that the steamer was in every way fitted for the voyage, it was a breach of the contract for her to stop at Gibralta for coal.

By the ship's log it appears that her stop there did not exceed five hours and was solely for the purpose of taking in a small additional quantity of coal. Gibralta was not out of her course, she

must of necessity pass in proximity to it, it is a well known coaling station for steamers, and I think it entirely to- harsh a construction to hold that a steamer stopping so short a time and under such circumstances is a deviation, and was not proceeding with all convenient speed to Phila.

The conclusion to which I have arrived is that S. & Co.
104 were not released from their obligation to load the vessel when she was tendered to them, and that they are liable to the owners for the damages resulting from their refusal so to do.

March 6th, 1880.

Agreement. Filed 10 *May*, 1880.

U. S. District Court.

VON LINGEN, &c., *vs.* DAVIDSON & others, and DAVIDSON & others, *vs.* VON LINGEN, &c. } Cross-libels.

It is agreed that the charter effected by Von Lingen and others of a steamer to supply the place of the "Whickham," was effected on as favorable terms as could have been obtained during the month of August, 1879. And that the recharter obtained
105 by Davidson & others for the "Whickham" was on as favorable terms as could have been obtained after her refusal by Von Lingen in Baltimore.

May 10, 1880.

T. WALLIS BLAKISTONE,
JOHN H. THOMAS,
For Von Lingen, &c.

A. STIRLING, JR,
For Davidson et al.

Decree. Filed 10 *May*, 1880.

District Court of the United States, District of Md.

VON LINGEN & others *vs.* DAVIDSON & others.

This case being ready for hearing and the proceedings, evidence, & arguments of the proctors for the respective parties having
106 been read, heard, & duly considered, it is adjudged, ordered, & decreed that the libel be & the same is hereby dismissed with costs.

May 10, 1880.

THOS. J. MORRIS.

Decree in Cross-libel. Filed 10 *May*, 1880.

District Court of the United States, Maryland District. In Admiralty.

T. H. DAVIDSON *et al. vs.* GEORGE A. VON LINGEN *et al.*

This cause coming on to be heard and being heard by the court on final hearing, and the evidence and the arguments of the proctors of the parties being heard and considered, it is by the court, this 10th day of May, 1880, ordered, adjudged, and decreed that the
107 libellants are entitled to recover for the breach of the charter party in the proceedings mentioned made between libellants and respondents, and that the libellants do recover against the respondents as damages for such breach the sum of four thousand and ninety-three dollars and eighteen cents and costs.

THOS. J. MORRIS.

From which said decrees the said George A. Von Lingen and others have prayed an appeal to the next term of the circuit court of the United States for the fourth circuit in and for the district of Maryland, to be held on the first Monday of April, in the year 1880.

Thereupon in pursuance of the statute in such cases made and provided, the record and proceedings of the decrees aforesaid, with all things thereunto relating are transmitted to the said circuit court accordingly.

108 *Appeal Bond. Filed* 11 *May*, 1880.

Know all men by these presents, that we, George A. Von Lingen, Joseph R. Foard, of the city of Baltimore, are held and firmly bound unto T. H. Davison, N. G. Clayton, J. Johnson, J. Liddell, Jr., B. Bramwell, H. H. Bell, W. White, G. Pickering, & H. Andrews, A. Drysdale & R. Brown, & T. W. Bulman, A. Wardlow & E. Eastern, T. V. S. Angier & Earl Onslow, J. Bolt, W. Bourne, E. F. Bourne, J. Elliott & E. Raffey, S. Dixon & C. W. Dixon, A. A. Angier, H. J. McCulloch, W. Wright, W. Chisholm, S. Cole, D. Brown, J. W. Nicholl, J. Straker, G. W. Blackett, J. Romanes, J. F. Moffatt, G. Drysdale & T. Ord, in the sum of three hundred dollars, to be paid unto the said obligees, their executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves & each of us, our & each of our heirs, executors, & administrators, jointly and severally, firmly by these presents. Dated this eleventh day of May, 1880.

Whereas George A. Von Lingen, Carl A. Von Lingen, and
109 William G. Atkinson have appealed to the circuit court of the United States for the district of Maryland from a decree of the district court of the United States for said district, bearing date the 10th day of May, 1880, in a case in which the said George A. Von Lingen, Carl A. Von Lingen, and William G. Atkinson were libellants and the said obligees were respondents:

Now, therefore, the condition of this obligation is such that if the above named George A. Von Lingen, Carl A. Von Lingen, and Wil-

liam G. Atkinson shall prosecute their appeal with effect & pay all such costs and expenses as shall be awarded against them as such appellants therein, then this obligation to be void; otherwise to remain in full force and effect.

GEORGE A. VON LINGEN. [SEAL.]
JOS. R. FOARD. [SEAL.]

Signed, sealed, and delivered in presence of—
HENRY T. MELONEY.

Endorsed: "Bond approved. Thos. J. Morris, district judge. May 11, '80."

110 *Appeal Bond, Cross-libel. Filed* 11 *May*, 1880.

Know all men by these presence that we, George A. Von Lingen and Joseph R. Foard, of the city of Baltimore, are held & firmly bound unto T. H. Davison, N. G. Clayton, J. Johnson, J. Liddell, Jr., B. Bramwell, H. H. Bell, W. White, G. Pickering, and H. Andrews, A. Drysdale, R. Brown & T. W. Bulman, A. Wardlow and E. Eastern, T. V. S. Angier and Earl Onslow, J. Bolt, W. Bourne and E. F. Bourne, J. Elliott and E. Raffey, S. Dixon and C. W. Dixon, A. A. Angier, H. J. McCulloch, W. Wright, W. Chisholm, S. Cole, D. Brown, J. W. Nicholl, J. Straker, G. W. Blackett, J. Romanes & J. F. Moffatt, G. Drysdale & T. Ord, in the sum of eight thousand dollars to be paid unto the said obligees, their executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Dated this eleventh day of May, 1880.

111 Whereas George A. Von Lingen, Carl A. Von Lingen, & Wm. G. Atkinson have appealed to the circuit court of the United States for the district of Maryland from a decree of the district court of the United States for the said district, bearing date the 10th day of May, 1880, in a cause in which the said obligees were libellants and the said George A. Von Lingen and others were respondents:

Now, therefore, the condition of this obligation is such that if the above-named George A. Von Lingen, Carl A. Von Lingen, & William G. Atkinson shall prosecute their appeal with effect, and pay all such damages, costs, and expenses as shall be awarded against them, as such appellants therein, then this obligation to be void; otherwise to remain in full force and effect.

GEORGE A. VON LINGEN. [SEAL.]
JOS. L. FORD. [SEAL.]

Signed, sealed, & delivered in presence of—
HENRY T. MELONEY.

Endorsed: "Bond approved. Thos. J. Morris, district judge. May 11, '80."

112 In testimony that the foregoing is a true transcript of the record and proceedings of the district court of the United States for the district of Maryland in the cause aforesaid.

In testimony whereof, I hereto subscribe my name and affix the seal of the said district court, this 11th day of May, anno Domini 1880.

[SEAL.] JAS. W. CHEW,
Clk Dist. Court U. S.

113 *Depositions Taken in Circuit Court.*

In the Circuit Court of the United States for the District of Maryland.

GEORGE A. VON LINGEN, CARL A. VON LINGEN, and WILLIAM G. ATKINSON, trading as A. Schumacher & Co.,

vs.

T. H. DAVIDSON and others.

and

T. H. DAVIDSON and others

vs.

GEORGE A. VON LINGEN, CARL A. VON LINGEN, and WILLIAM G. ATKINSON, trading as A. Schumacher & Co.

Costs to commissioner:

A. Schumacher & Co.---- $6 00
T. H. Davidson *et als.*---- $5 00

114 UNITED STATES OF AMERICA, }
District of Maryland, } *ss:*

I, Robert Lyon Rogers, a commissioner of the United States in and for the district of Maryland, do hereby certify that on this Saturday, 8th of May, A. D. 1880, I met at my office, No. 50 West Fayette, in the city of Baltimore, within said district, at four o'clock p. m., and then and there, at the request and with the consent of the attorneys of the respective parties hereinafter named, proceeded to take certain depositions in the case of George A. Von Lingen, Carl A. Von Lingen, and William G. Atkinson, trading as A. Schumacher & Co., against T. H. Davidson and others, and in the case of T. H. Davidson and others against George A. Von Lingen, Carl A. Von Lingen, and William G. Atkinson, trading as A. Schumacher & Co., depending in the circuit court of the United States for the district of Maryland, as follows, viz:

115 JOSEPH R. FOARD, a witness for Von Lingen, trading as Schumacher & Co., being first by me duly sworn, deposes and says as follows:

1st Int. What is your name, your age, your occupation, and where do you reside?

Answer. My name is Joseph R. Foard; I am twenty-seven years of age; I am a ship broker, and reside in Baltimore, Maryland.

2 Int. Please look at the charter party now shown you, being the charter party filed with the bill in this case, and say if you were

the broker through whom the same was negotiated, and who represented the owners of the steamship and whom you represented?

Answer. I represented Messrs. Schumacher & Co. in negotiating this charter party, and Messrs. Erickson & Co., ship brokers, of this city, represented the owners of the steamship, and this charter party is a true copy of the original executed by the parties whose names are appended thereto.

116 It is here admitted by the proctors of the respective parties that the charter party spoken of by the witness of which the paper filed with the libel is a copy was duly executed by the parties professing to make the same, and that the paper spoken of by the witness is a true copy thereof.

3 Int. State in detail, if you know, the circumstances under which the charter party was executed?

(Question objected to by Mr. Sterling.)

Answer. During the latter part of the month of July last I was requested by Messrs. Schumacher & Co. to keep a lookout for a steamer to carry a cargo of grain from here to Europe, which they wished to ship during the month of August, and on the first of August I learned that Messrs. Ereckson & Co. had in hand a steamer suitable for that purpose. I saw them in regard to it and found they had authority through Messrs. H. S. Gregg & Co., of Philadelphia, to charter for such a voyage the steamship Whickham, which their telegram, authorizing them to close, stated had sailed, or was

117 about to sail, from Benisaf with cargo for Philadelphia. A few moments later we met at the office of Messrs. Schumacher & Co., where the charter was concluded. Mr. Ereckson was fully advised of the purpose for which the vessel was chartered, viz., to ship a cargo during the month of August. Messrs. Schumacher & Co. urged at first that there was some doubt in their minds of the vessel arriving in time for that shipment. I myself thought that she would arrive in time. Mr. Ereckson urged that the vessel was either already on her passage to Phiiadelphia or was ready to leave almost immediately. He entered into a calculation to show that the vessel would arrive in time, and with the intention of loading her in Philadelphia in the event of her not being able to get to Baltimore in time, Messrs. Schumacher & Co. agreed to the charter. On the next morning a charter party was produced by Messrs. Ereckson & Co., which contained, after the words "British Lloyds now," in the charter party in this cause, the words "sailed or loading at Benisaf" in place of the words in this charter party "sailed or about to sail from Benisaf." That charter party was

118 objected to by Messrs. Schumacher & Co. as not being in accordance with the negotiations of the day before. They insisted that the vessel they had chartered had sailed, or was about to sail, and they did not want a vessel that was loading at Benisaf, and declined to sign any charter party that did not agree with the terms and conditions of the telegram of Messrs. H. S. Gregg & Co. offering the vessel to Messrs. Erickson & Co. Later in the day Messrs. Ereckson & Co. informed Messrs. Schumacher & Co. that a new char-

ter party containing the words of the telegram would arrive on the following morning. That charter party did come to hand, and was executed, and is the original charter party of which the paper filed with the libel is a copy.

4 Int. You state that under the charter party which was executed it was the purpose of Messrs. Schumacher & Co. to load the steamer in Philadelphia in the event of her not arriving in Baltimore in time; was anything said as to the time within which the loading in Philadelphia should take place?

119 Answer. There was nothing said to Ereckson about that.

5. Int. Was it understood by Messrs. Ereckson & Co. that the steamer was to be loaded under the charter party during the month of August, whether loaded in Philadelphia or Baltimore?

Answer. There was no understanding with Messrs. Ereckson & Co. as to the steamer's loading in Philadelphia at all. She was to be loaded in the month of August under the charter party.

6 Int. You have stated that a calculation was made by Mr. Ereckson in order to ascertain at what time the steamer would arrive here; what facts were assumed as the basis of that calculation?

Answer. That the steamer had already sailed from Benisaf, or was to sail on that or the following day.

7 Int. Was there any other element in the calculation than the number of days necessary to make the voyage from Benisaf to Philadelphia or Baltimore?

120 Answer. Nothing but the exigencies of the sea. There was no other element in the calculation than the time to make the voyage to Philadelphia, her discharge of cargo in Philadelphia, and the time to get from there to Baltimore.

8 Int. What is the ordinary voyage of a steamer, such as the Wickham, from Benisaf to Philadelphia or Baltimore?

Answer. That varies with the season. At the time of that vessel's charter, some steamers had arrived in from fourteen to eighteen days from Gibraltar, and Benisaf to Gibraltar would be a sail of about twenty-four hours.

9 Int. What was Mr. Erickson's estimate of the voyage of the Wickham from Benisaf to Baltimore or Philadelphia, and on what hypothesis did he make it?

Answer. If I remember rightly the utmost length of the voyage according to his calculation was twenty days.

10 Int. Did the said steamer arrive either in Philadelphia or
121 Baltimore in time to take on board a cargo, or to begin doing so during the month of August?

Answer. She did not.

11 Int. What was the consequence of her not arriving in either city in time to be loaded during the month of August?

Answer. The consequence was that after Messrs. Schumacher & Co. with considerable effort, and a number of requests to be advised of the vessel's exact position—they having no report of her having passed out from Gibraltar—that she had not sailed from Benisaf, as they learned from Messrs. Erickson & Co., until the 7th of August—it was manifest that she could not possibly arrive in time for an

August shipment, Messrs. Schumacher & Co. proceeded to charter another vessel in her place.

12 Int. What was the difference in the freight paid under the re-charter or substituted charter and that of the steamer Whickham?

Answer. Two thousand dollars more was to be paid by
122 Messrs. Schumacher & Co. for the vessel they substituted, and Messrs. Schumacher & Co. paid this difference in freight.

13 Int. After Messrs. Schumacher & Co. found that the Whickham would not arrive in time to load in August, could they have obtained another steamer to supply her place at a better freight rate than the one they did actually charter?

Answer. I do not believe they could.

Examination-in-chief closed.

It is here noted that Mr. Stirling excepted to the foregoing questions propounded to the witness and his answers thereto as to the telegram spoken of.

Cross-examined:

1 X Int. This charter party is dated the 1st of August, 1879. What was the date of the telegram of which you have spoken?

Answer. The 1st of August.

123 2 X Int. Was the other charter party you have spoken of shown you on the same day, the 1st of August, or on what date?

Answer. It was shown me on the 2d of August.

3 X Int. In the course of the conversation of the negotiation which preceded the signing this charter party of the 1st of August, did you or Messrs. Schumacher & Co. request or endeavor to have inserted in the charter a clause that the vessel should arrive in time for August shipment?

Answer. Neither Messrs. Schumacher & Co. or myself asked for a clause in exactly those words. Messrs. Schumacher & Co. did ask that the vessel should be guarantied to arrive in time for an August shipment. This guaranty, it was said by Mr. Ereckson, it would be impossible to give, and my own experience of asking owners for such a guaranty without their having a broad latitude of time to run no risk from the ordinary dangers and accidents of the sea, enabled me to know myself the uselessness of asking the owners to consent to it.

124 Mr. Stirling excepted to the last clause of the answer as not responsive to the question.

4 X Int. When you speak of the news you got afterwards from Mr. Ereckson as to the date of the vessel leaving Benisaf in fact, was not the information derived entirely from the time at which the vessel passed Gibraltar?

Answer. I do not know positively, but I suppose I was.

5 X Int. Is there any cable to Benisaf?

Answer. Not that I am aware of.

6 X Int. At what time did you make the charter of the vessel you

got when you became satisfied that the Whickham would not arrive for an August shipment, and when did you determine to substitute another vessel for the Whickham?

Answer. The charter of the vessel instead of the Whickham was made, I think, on the 16th of August; we decided to make it when we heard that the vessel had passed Gibraltar, which was the 9th of August.

125 7 X Int. You have spoken of the time commonly taken by vessels from Benisaf to Baltimore or Philadelphia; what sort of cargo do vessels so arriving get at Benisaf?

Answer. Iron ore only.

Cross-examination closed.

Re-examined:

14 Int. Who constituted the firm of A. Schumacher & Co. on the 1st of August, 1879, the date of the charter party filed with their libel?

Answer. George A. Von Lingen, Carl A. Von Lingen, and William G. Atkinson.

15 Int. Was the charter party spoken of in your examination-in-chief, which you say A. Schmacher & Co. refused to execute, shown to you before or after the execution of the one filed with the libel?

Answer. It was shown to me before.

126 16 Int. Was the new charter party which you say they effected to take the place of that of the steamer Whickham made as soon as they could procure a vessel after they learned that the Whickham had not sailed from Benisaf, or was not about to sail therefrom at the date of the charter party filed with the libel?

Question objected to by Mr. Stirling.

Answer. It was made as soon as possible thereafter, and when Messrs. Schumacher & Co. were convinced that no cheaper vessel could be had than the one they procured.

17 Int. When you and they learned that the Whicham did not pass Gibraltar until the 9th of August what information did that give you as to the time at which she must have sailed from Benisaf?

Answer. From what we knew of the place, she had left there the day before.

18 Int. Did you and they immediately thereupon seek for a vessel to take her place or not?

Answer. We did seek a vessel immediately.

127 19 Int. Did the agents of the Whickham give to you or Messrs. Schumacher & Co. any notice of her arrival in Philadelphia?

Answer. They did not.

Re-examination closed.

Cross examined:

8 X Int. Did you not know when the vessel arrived in Philadelphia?

Answer. Yes, we did.

Cross-ex. closed.

Re-examined:

20 Int. Did you know personally when the steamer Whickham. arrived in Philadelphia, or did you have any information of her arrival other than that derived from newspapers?

Answer. I did know personally that she had arrived there.

128 21 Int. Were you the agent of Messrs. A. Schumacher & Co. for any other purpose than to procure the charter party for the vessel, or to seek for another vessel when they determined to do so?

Answer. I was not.

22 Int. Where did H. S. Gregg & Co. live on the 1st of August, 1879, and where have they lived from that time to the present?

Answer. They lived in Philadelphia the 1st of August, 1879, and they lived there when the Whickham arrived there. Where they have lived since that time I do not know.

Re-examination closed.

Cross-examined:

9 X Int. Did not Messrs. Schumacher & Co. know of the arrival of the Wickham in Philadelphia, and had they not then and prior to that time decided not to load the vessel at all?

Answer. They did know of *her* arrival of the vessel in Phila-

129 delphia. I cannot say positively that they had at that time or prior thereto decided not to load the vessel.

Re-examined:

23 Int. Was there a cable communication between Gibraltar and Philadelphia or Gibraltar and Baltimore on or before the 1st of August, 1879, and has there been from that time till the present?

Answer. There was and has been at that date cable communication between Gibraltar and both places, and there has been since and is now.

JOS. R. FOARD.

Subscribed and sworn to before me, this 8th day of May, A. D. 1880.

R. LYON ROGERS,
U. S. Commissioner for Maryland.

130 EDMUND D. BIGELOW, a witness produced on behalf of T. H. Davidson & Co., being first by me duly sworn, makes oath, deposes, and says, as follows:

1 Int. What is your name, your age, your occupation, and where do you reside?

Answer. My name is Edmund D. Bigelow. I am forty-one years of age. I am a ship broker, and reside in Baltimore, Maryland.

2 Int. In the month of September, 1879, what were the rates in

Baltimore for delivering grain by elevators into vessels for transatlantic shipments?

Question objected to by Messrs. Thomas and Blackistone.

Answer. The ship's share of the elevator charges was three-eighths of a cent a bushel.

3 Int. At the same date, what were the pilotage charges in Baltimore, from Baltimore outward, for a steamer such as the Whickham?

131 Question objected to by Messrs. Thomas and Blakistone.

Answer. Five dollars per foot of the draft of the vessel.

4 Int. What would be about the draft of the Whickham when loaded?

Answer. I should say about twenty-two feet.

5 Int. At the same time, what would have been the freight brokerage in Baltimore on a steamer of the size of the Whickham with an outward cargo of grain of 10,625 quarters?

Question objected to by Messrs. Thomas and Blackistone.

Answer. It is not the custom in Baltimore to charge freight brokerage.

6 Int. What would have been the ship-broker's commission in Baltimore under the same circumstances?

Questien objected to by Messrs. Thomas and Blackistone.

132 Answer. The regular charge is five per cent., but the universal custom, I believe, is to return two and a half per cent.; this is on the gross freight.

7 Int. At the same time, what was the average price for coal for sea-going steamers of that class in Baltimore?

Question objected to by Messrs. Thomas and Blackiston.

Answer. To the best of my recollection, about three dollars and eighty cents per ton, trimmed in the bunkers.

Examination-in-chief closed.

Cross-examined:

1 X Int. What, among ship brokers, or between shipowners and charterers, is the meaning of the words, "now sailed or about to sail from Benesaf with cargo," in a charter party?

Question objected to by Mr. Stirling.

133 Answer. I cannot say that those words are in general use; I, as a ship broker, would consider that they would mean that if a ship had not sailed, she was in a very forward position towards sailing.

Answer objected to by Mr. Stirling, as proving no general usage.

2 X Int. What do you mean by being in a very forward position?

Question objected to by Mr. Stirling.

Answer. About ready to sail; I could not name any particular number of hours or any particular time when she ought to sail under such circumstances; it is a mere opinion of mine; I have no precedent.

3 X Int. Would you, as a ship broker, consider those words properly used in reference to a steamer which required a week to complete her loading?

Question objected to by Mr. Stirling.

Answer. I should not think, under such circumstances, the words were properly used.

134 4 X Int. Are or are not the opinions you have expressed solely the result of your experience as a ship broker?

Question objected to by Mr. Stirling.

Answer. I hardly know how [to] answer that question. I am a ship broker and have the opinions I have expressed. If I were a farmer I might entertain the same opinions.

5 X Int. I did not ask you what might have been your opinion if you had been a farmer, but whether or not the opinion you have expressed was solely the result of your experience as a ship broker?

Answer. The opinions I expressed I expressed as a ship broker.

Cross-ex. closed.

Re-examined:

135 8 Int. Do you mean to testify that you are aware of, as a ship broker, a general and well established usage known and assented to by the trade, defining and agreeing on the meaning of the said words?

Answer. I do not.

E. D. BIGELOW.

Subscribed and sworn to before me, this 8th day of May, A. D. 1880.

R. LYON ROGERS,
U. S. Commissioner for Maryland.

Mr. Stirling objects to all the questions and answers to and of this witness on cross-examination, as not cross-examination, and if considered as evidence-in-chief for Schumacher & Co., irrelevant and incompetent.

I, Robert Lyon Rogers, a commissioner as aforesaid, do hereby further certify that the reason for taking the foregoing depositions of Joseph R. Foard and Edmond D. Bigelow is because of the consent and agreement of the attorneys of the parties respectively

136 in the causes hereinbefore mentioned, that the same should be taken in manner and form as the same have been taken.

I do also certify that John H. Thomas and T. Wallis Blackiston, Esquires, attorneys for George A. Von Lingen, Carl A. Von Lingen, and William G. Atkinson, trading as A. Schumacher & Co., and

Archibald Stirling, Jr., Esq., attorney for T. H. Davidson and others, were present before me at the taking of the said depositions.

I do also certify that the said witnesses were first by me carefully examined and cautioned and duly sworn according to law to testify the whole truth; and that the said depositions were then reduced to writing by me, and thereafter subscribed by the said witnesses in my presence.

And I do also certify that I am not of counsel or attorney for either of the parties to the said causes, and that I am not interested in the event of the said cases.

Given under my hand and seal at the city of Baltimore, within the district of Maryland, this 8th day of May A. D. 1880.

[SEAL.] R. LYON ROGERS,
U. S. Commissioner for Maryland.

137 The findings of the facts and conclusions of law by, and opinion of, the Honorable Morrison R. Waite, Chief Justice of the Supreme Court, sitting in the circuit court here.

Circuit Court of the United States for the District of Maryland.

GEORGE A. VON LINGEN *et al.*
vs.
T. H. DAVIDSON *et al.* } Libel.

T. H. DAVIDSON *et al.*
vs.
GEORGE A. VON LINGEN *et al.* } Cross-libel.

Facts found by the court:

1. The British steamer "Whickham," owned by T. H. Davidson and others, the defendants in the original libel, sailed from Shields on the 9th of July, 1879, bound for Libson, where she arrived on the 16th; and, having discharged her cargo, sailed again in ballast, on the 23d, for Benizaf, on the coast of Morocco, to take a load
138 of iron ore under a charter for Philadelphia. She passed Gibraltar on the 25th, and arrived at Benizaf at 4.30 p. m. of Saturday, the 26th. She began taking in cargo under the charter for Philadelphia during the forenoon of Monday, the 28th. On that day she took on board 115 tons, and on the 29th about 90 tons; but on the 30th none; and on the 31st only four boat loads. During this time there was delay in delivering the cargo on board, as other vessels in port were entitled to precedence in loading. After the 31st the cargo was put on board with as much dispatch as could have been expected at that place, and it was all in on the 7th of August at 5.30 p. m. An hour later the vessel sailed, and, stopping five hours at Gibraltar for coal on the 9th, arrived at Philadelphia on the 2d of September. She completed her unloading at that port on the 7th.

2. The usual cargo at Benizaf is iron ore. In loading, a vessel lies out in the stream about a quarter of a mile from the shore, and the ore is taken to her in small boats of from five to seven tons bur-

then each. It is then passed up the ship's side in baskets.
139 Two or three stages are put up between the boats and the ship's decks, and two men on each stage receive and pass the baskets. This is the only way of loading such cargo at that port.

3. About the first of August Gregg & Co., a firm of ship brokers in Philadelphia, were authorized by cable message from the owners in England to get a charter for the Whickham to carry grain from the United States on her return voyage. Not being able to do this in Philadelphia, the firm on the first of August telegraphed Mr. Erickson, a ship broker in Baltimore, to look for a charter in that city. In their telegram it was said that the vessel "had sailed or was about to sail from Benizaf with cargo for Philadelphia." The precise form of the authority given by the owners to Gregg & Co. is nowhere shown from the evidence, further than may be inferred from the telegram to Erickson.

4. A short time before the first of August, Schumacher & Co., of Baltimore, the original libellants, employed Mr. Foard, another
140 ship broker in that city, to procure them a vessel to take a cargo of grain to Europe, which they were under contract to ship in August. He, finding that the steamers for that month were scarce, and hearing of the Whickham, took Mr. Ericson to the office of Schumacher & Co., and suggested that she might do. At the interview which then took place, it was understood by all parties that a vessel was wanted that could be loaded in August, and that no other would answer the purpose. Schumacher & Co., doubting whether the Whickham could arrive in time, wanted a guaranty that she would, but this was declined. All parties then made their calculations as to the probable time of her arrival, upon the basis of the language in the telegram, and finally Schumacher & Co. agreed to take her, first, however, providing that she might be loaded in Philadelphia or Baltimore, at their option, intending if she did not arrive in time for Baltimore, to put her cargo under their contract in Philadelphia. In these calculations it was assumed by all that she would get away from Benizaf not later than the second of August, and that her voyage across would probably be about twenty days.

This all occurred in Baltimore on the first of August, and it
141 does not appear from the evidence that any of the parties, either in Philadelphia or Baltimore, knew anything of the movements of the vessel except as they were to be informed from the telegram. There was no communication with Benizaf by telegraph, the nearest telegraphic station being at Gibralter, which was a day's sail away.

5. As soon as the bargain was concluded Erickson sent to Gregg & Co. for a charter party in form. They immediately sent the draft of one in which the vessel was described as "sailed from or loading at Benizaf." This Schumacher & Co. declined to accept, on the ground that their agreement was for a vessel that "had sailed or was about to sail from Benizaf with cargo for Philadelphia." This being communicated to Gregg & Co. they at once sent forward a new draft to meet the wishes of Schumacher & Co., and using the language they insisted upon. This new draft reached Baltimore on the second

of August, and was duly executed by all parties. This is the instrument, a copy of which is marked Exhibit A, and filed with the original libel. From this it appears that in the printed blank
142 which was used there were the following words: "Charters to have option of cancelling this charter party should vessel not have arrived at loading port prior to ——." These words were erased by drawing a pen through them before signing.

6. Schumacher & Co., having ascertained, on the 9th of August, that the steamer passed Gibralter outwards from Benizaf on that day, and being then satisfied that she would not arrive in time to load, either at Baltimore or Philadelphia, in August, at once set about securing another vessel, and on the 16th got one, which they afterwards loaded at an increased cost of freight to them over what they would have been compelled to pay the Wickham of one thonsand nine hundred and eighty-eight $\frac{25}{100}$ dollars. It is agreed that this new charter was effected on as favorable terms as it could have been in the month of August, and that if Schumacher & Co. are entitled to recover at all, it must be for the increase in the cost of freight which they paid.

7. The discharge of the cargo of iron ore from the Whickham was completed with despatch, at Philadelphia, and on the
143 7th of September she sailed for Baltimore, where she arrived on the 9th, and was tendered Schumacher & Co., under the charter, on the 11th. They declined to accept her, for the reason that, as they claimed, when the charter party was entered into she had neither sailed nor was about to sail from Benizaf within the meaning of that provision in the charter, as understood by the parties. Another charter was then obtained, but at a loss to her of four thousand and ninety-three $\frac{18}{100}$ dollars, as of May 10, 1880. It is agreed that this charter was as favorable as any that could have been effected, and that if her owners are entitled to recover at all it must be for the above amount as their loss.

WAITE, Ch. J.:

The only question in this case is, whether, on the first of August, 1879, the Whickham was "about to sail from Benizaf with cargo for Philadelphia" within the meaning of that term as used in the charter sued on. The owners in England having adopted the contract made for them by their agents in Philadelphia and Bal-
144 timore, are bound by its terms just as their agents would be were they principals. The language used must, therefore, be interpreted, if possible, as the parties in Baltimore understood it when they were contracting.

It is conceded that if the Whickham was "about to sail," giving that phrase the effect it was intended to have, Schumacher & Co. took the risk of her arrival in time to answer their purposes, but if she was not, that the warranty to that effect was broken, and her owners must make good the loss caused by the breach.

About is a relative term. It may indicate one thing when applied to one state of facts, and another under different circumstances. "Contracts, when their meaning is not clear, are to be construed in

the light of the circumstances surrounding the parties when they were made, and the practical interpretations which they by their conduct have given the provisions in controversy." Lawber *vs.* Bangs, 2 Wall., 737. The prominent fact in this case is that a vessel was wanted to load at Baltimore in August. This was brought directly to the attention of all the contracting parties, and it was well understood that Schumacher & Co. would not take the Whickham
145 unless there was a reasonable probability of her arrival in time. That the charter would not have been made if it had been known that she could not get away from Benisaf until the evening of the 7th is apparent from the fact that as soon as it was ascertained she did not pass out from Gibralter until the 9th, steps were taken to get another vessel in her place. In addition to this, the testimony shows that when the parties were making their calculations as to the time she would probably reach Baltimore, it was assumed that she either had sailed, or at the latest would sail on the next day, which was the second of August. It was not supposed that her time to Philadelphia would be less than twenty days, and this, with a reasonable allowance for unloading, could not put her in Baltimore earlier than the 28th or 29th, if she sailed as late as the second. Her actual time to Philadelphia exceeded the estimate; but this, if her sailing had been prompt, would have been at the risk of the charterers. Parol evidence is not admissible to vary the terms of a written instrument, but where ambiguity exists it may
146 be given, in aid of interpretation, to show the facts and circumstances in the midst of which the parties were acting. These assumptions and calculations are facts in the light of which this indefinite word is to be read. Since "about" may mean a longer or shorter period, according to circumstances, these circumstances tend to show what limitation the parties put upon it in this transaction.

Another important fact is found in the practical interpretation which the parties have by their conduct put on the language they have used. Gregg & Co., in Philadelphia, seemed to have assumed that the vessel would be about to sail from Benisaf with cargo, within the meaning of their telegraphic authority to Erickson if she were there loading, and they, consequently, in their first draft of the charter party, described her as "sailed or loading at Benisaf." This, however, did not meet the views of Schumacher & Co., and they declined to enter into the contract on those terms, claiming that they had agreed for a vessel that was "about to sail." In this way, they, in effect, said that according to their understanding of the
147 language upon which they had been acting, a vessel might not be "about to sail," if she were only loading at such a port as Benisaf, and with such a cargo as she was getting there. To this suggestion Gregg & Co. apparently assented without objection, for they immediately sent forward the new charty party, with their signature affixed, in which the vessel was described in accordance with the language they had used in their telegram to Ereckson. Such conduct shows clearly that the word about was used

advisedly as indicating some shorter period of time than loading would necessarily imply.

Under these circumstances, it seems to me clear that the parties must have understood their language to mean that the Whickham had either sailed, or was *about ready* to sail, with cargo. It is difficult to reconcile any other interpretation with the undisputed facts in reference to which the parties were acting. Taking this as the effect of the contract, I have had no difficulty in reaching the conclusion that the vessel was not in the condition she was represented to be. Her carrying capacity was something over eleven
148 hundred tons. Her cargo was iron ore, which could only be put on board in a particular way, and by hand, without the use of machinery. Less than three hundred tons were then in, and although the utmost diligence was employed, the remainder was not got on board until late in the sixth day afterwards. In short, she was not more than three-elevenths loaded, and the time of finishing was subject to all the contingencies of wind, weather, labor, and boats, incident to an open roadstead on the northern coast of Africa. Certainly, in this condition she could not be considered as ready to sail. At most, she was only loading, with the time of her sailing to a great extent uncertain. It is true that the term about implies in such a connexion the lapse of time, but not enough, as it seems to me, in this case to enable the vessel to do what was required of her to put herself in a condition to sail with cargo under her charter from Benisaf to Philadelphia.

It follows that the original libellants are entitled to recover, and that the cross-libel must be dismissed. A decree may be prepared accordingly.

149 *Conclusions of Law*

1. That the Whickham was not about to sail from Benizaf on the 1st of August, within the meaning of that term as used by the charter party.

2. That Schumacher & Co. are entitled to recover from the defendants to their libel the sum of $1,988.25, and the interest thereon from September 11, 1879.

3. That the cross-libel of T. H. Davidson & others must be dismissed.

M. R. WAITE,
Chief Justice.

Decree of Circuit Court. Filed 15 *Nov.*, 1880.

Circuit Court of the United States for the District of Maryland.

GEORGE A. VON LINGEN *et al.*
vs.
T. H. DAVISON *et al.* } Libel.

150 T. H. DAVISON *et al.*
vs.
GEORGE A. VON LINGEN *et al.* } Cross Libel.

Decree.

These causes having been tried and argued together, and the evidence and proceedings therein, and the arguments of the proctors for the respective parties having been read, heard, and duly considered, the court finds the following, viz.:

Facts found by the court:

1. The British steamer "Whickham," owned by T. H. Davison and others, the defendants in the original libel, sailed from Shields on the 9th of July, 1879, bound for Lisbon, where she arrived on the 16th, and having discharged her cargo, sailed again in ballast on the 23d for Benizaf, on the coast of Morocco, to take a load of iron ore under a charter for Philadelphia. She passed Gibralter on the 25th, and arrived at Benizaf at 4.30 p. m., Saturday, the 26th. She began taking in cargo under the charter for Philadelphia dur-
151 ing the forenoon of Monday, the 28th. On that day she took on board 115 tons, and on the 29th about 90 tons, but on the 30th none, and on the 31st only four boat-loads. During this time there was delay in delivering the cargo on board, as other vessels in port were entitled to precedence in loading. After the 31st the cargo was put on board with as much dispatch as could have been expected at that place, and it was all in on the 7th of August at 5.30 p. m. An hour later the vessel sailed, and, stopping five hours at Gibralter for coal on the 9th, arrived at Philadelphia on the 2d of September. She completed her unloading at that port on the 7th.

2. The usual cargo at Benizaf is iron ore. In loading, a vessel lies out in the stream, about a quarter of a mile from the shore, and the ore is taken to her in small boats of from five to seven tons burthen each. It is then passed up the ship's side in baskets. Two or three stages are put up between the boats and the ship's decks, and two men on each stage receive and pass the baskets. This is
152 the only way of loading such cargo at that port.

3. About the first of August Gregg & Co., a firm of ship brokers in Philadelphia, were authorized by cable message from the owners in England to get a charter for the Whickham to carry grain from the United States on her return voyage. Not being able to do this in Philadelphia, the firm, on the first of August, telegraphed Mr. Erickson, a shipbroker in Baltimore, to look for a charter in that city. In their telegram it was said that the vessel "had sailed or was about to sail from Benizaf with cargo for Philadelphia." The

precise form of the authority given by the owners to Gregg & Co. is nowhere shewn from the evidence further than may be inferred from the telegram to Erickson.

4. A short time before the first of August, Schumacher & Co., of Baltimore, the original libellants, employed Mr. Foard, another ship broker in that city, to procure them a vessel to take a cargo of grain to Europe, which they were under contract to ship in August.
153 He, finding that steamers for that month were scarce, and hearing of the Whickham, took Mr. Erickson to the office of Schumacher & Co. and suggested that she might do. At the interview which then took place it was understood by all parties that a vessel was wanted that could be loaded in August, and that no other would answer the purpose. Schumacher & Co., doubting whether the Whickham could arrive in time, wanted a guaranty that she would, but this was declined. All parties then made their calculations as to the probable time of her arrival upon the basis of the language in the telegram, and finally Schumacher & Co. agreed to take her, first, however, providing that she might be loaded in Philadelphia or Baltimore at their option, intending if she did not arrive in time for Baltimore to get her cargo under their contract in Philadelphia. In these calculations it was assumed by all that she would get away from Benizaf not later than the second of August, and that her voyage across would probably be about twenty days. This all occurred at Baltimore on the first of August, and it does not
154 appear from the evidence that any of the parties, either in Philadelphia or Baltimore, knew anything of the movements of the vessel except as they were to be inferred from the telegram. There was no communication with Benizaf by telegraph, the nearest telegraphic station being at Gibralter, which was a day's sail away.

5. As soon as the bargain was concluded Erickson sent to Gregg & Co. for a charter party in form. They immediately sent the draft of one, in which the vessel was described as "sailed from or loading at Benizaf." This Schumacker & Co. declined to accept, on the ground that their agreement was for a vessel that "had sailed, or was about to sail, from Benizaf, with cargo for Philadelphia." This being communicated to Gregg & Co., they at once sent forward a new draft, to meet the wishes of Schumacher & Co., and using the language insisted upon. This new draft reached Baltimore on the second of August, and was duly executed by all parties. This is the instrument, a copy of which is marked Exhibit A, and filed with the original libel. From this it appears that in the printed blank which was used there were the following words: "Char-
155 tere-s to have option of cancelling this charter party should vessel not have arrived at leading port prior to ——." These words were erased by drawing a pen through them before signing.

6. Schumacher & Co., having ascertained on the 9th of August that the steamer passed Gibralter outwardly from Benizaf on that day, and being then satisfied that she would not arrive in time to load either at Baltimore or Philadelphia in August, at once set about securing another vessel, and on the 16th got one, which they afterwards loaded at an increased cost of freight to them over what they

would have been compelled to pay the Whickham of one thousand nine hundred and eighty-eight $\frac{25}{100}$ dollars. It is agreed that this new charter was effected on as favorable terms as it could have been in the month of August, and that if Schumacher & Co. are entitled to recover at all it must be for the increase in the cost of freight which they paid.

7. The discharge of the cargo of iron ore from the Whickham was completed with dispatch at Philadelphia, and on the 7th
156 of September she sailed for Baltimore, where she arrived on the 9th, and was tendered to Schumacher & Co. under the charter on the 11th. They declined to accept her for the reason that, as they claimed, when the charter party was entered into she had neither sailed, nor was about to sail, from Benizaf within the meaning of that provision in the charter as understood by the parties. Another charter was then obtained, but at a loss to her of four thousand and ninety-three $\frac{18}{100}$ dollars as of May 10th, 1880. It is agreed that this charter was as favorable as any that could have been effected, and that if her owners are entitled to recover at all, it must be for the above amount as their loss, and—

Conclusions of Law.

1. That the Whickham was not about to sail from Benizaf on the first of August within the meaning of that term as used in the charter party.

2. That Schumacher & Co. are entitled to recover from the defendants to their libel the sum of $\$1,988\frac{25}{100}$, and the interest
157 thereon from September 11th, 1879.

3. That the cross-libel of T. H. Davidson and others must be dismissed.

It is therefore, this thirteenth day of November, 1880, adjudged, ordered, and decreed that the decrees of the district court of the United States for the district of Maryland in each of said cases be, and the same are hereby, reversed, and that the said George A. Von Lingen, Carl A. Von Lingen and William G. Atkinson, copartners trading as A. Schumacher & Co., libellants in the first of the above-mentioned causes, recover from the said T. H. Davison, N. G. Clayton, J. Johnson, J. Liddell, Jr., and C. Liddell, B. Bramwell, H. H. Bell, W. White, G. Pickering and H. Andrews, A. Drysdale, R. Brown and T. W. Bulman, A. Wardlow and E. Easten, T. V. S. Angier and Carl Onslow, J. Bolt, W. Bourne and E. F. Bourne, J. Elliott, E. Raffey, S. Dixon and C. W. Dixon, A. A. Angier, H. J. McCulloch, W. Wright, W. Chisholm, S. Cole, D. Brown, J. W. Nichol, J. Straker, G. P. Blackett, J. Romanes and J. F. Moffat, G. Drysdale and T. Ord, the sum of two thousand one hundred
158 and twenty-eight dollars and seven cents, with interest thereon until paid, together with the costs of said libellants in the district and circuit courts; and it is further adjudged, ordered, and decreed that the cross-libel of the said T. H. Davison and others against the said George A. Von Lingen and others be, and the same is hereby, dismissed, with costs in both of said courts.

M. R. WAITE.

Agreement. Filed 22d Dec., 1880.

U. S. Circuit Court, District of Md.

GEORGE A. VON LINGEN, CARL A. VON LINGEN, & WILLIAM G. ATKINSON,
vs.
T. H. DAVISON, N. G. CLAYTON and others, owners of steamship "Whickham."

T. H. DAVIDSON, N. G. CLAYTON and others,
vs.
GEORGE A. VON LINGEN, CARL A. VON LINGEN, and WILLIAM G. ATKINSON.

159 It is agreed that forty-two hundred and fifty dollars shall be deposited in the registry of this court to the credit of the above two causes, and have the same effect as if an appeal bond were given to the owners of the Whickham, (the respondents in the first and the libellants in the second of said causes.) That if an appeal be not taken within sixty days from the date of the decree, or if it shall be taken and not prosecuted with effect, the said money shall be applied to the payment of the decree, with interest thereon, and all costs by order of the circuit court or one of the judges thereof.

A. STIRLING, JR.,
For Davision et al.
T. WALLIS BLAKISTONE,
JNO. H. THOMAS,
For Von Lingen and others.

Same day, $4,250.00 deposited in the registry of the court in pursuance of above agreement.

Prayer of Appeal. Filed 5 Jan'y, 1881.

160 In the Circuit Court of the United States for the District of Maryland, on appeals from the District Court in Admiralty.

GEORGE A. VON LINGEN, &c., trading as Schumacher & Co.,
vs.
T. H. DAVIDSON & OTHERS.
and
SAME
vs.
SAME.
} Cross-libels.

The appellees in the above cause pray an appeal to the Supreme Court of the United States from the decree of the circuit court passed therein, and that citation in due form may issue, bond having been waived by agreement heretofor filed.

A. STIRLING, JR.,
Proctor for Appellees.

Let the appeal be allowed and the citation issue as prayed.

HUGH L. BOND, *C't Judge.*

161 Thereupon it is ordered by the court here that the record and proceedings aforesaid, with all things relating to the same, be transmitted to the Supreme Court of the United States, to be held on the second Monday of October next, and the same is transmitted accordingly.

162 UNITED STATES OF AMERICA, } *to wit:*
District of Maryland, }

To George A. Von Lingen, Carl A. Von Lingen, and William G. Atkinson, copartners, trading as A. Schumacher & Company, Greeting:

You are hereby cited and admonished to be and appear at the Supréme Court of the United States, to be held at the city of Washington, on the second Monday of October next, pursuant to an appeal from the circuit court of the United States for the fourth circuit in and for the district of Maryland, passed in a cause *in a cause* in said court, wherein you were appellants, and T. H. Davison and others, owners of the steamship "Whickham," were appellees, to show cause, if any there be, why the said decree, so as aforesaid passed, should not be corrected, and speedy justice done to the parties in this behalf.

Witness my hand and seal, this 25 day of April, A. D. 1881.

HUGH L. BOND, *C't Judge.* [SEAL.]

Service acknowledged, this 25 day of April, A. D. 1881.

JOHN H. THOMAS,
J. WALLIS BLAKISTONE,
Proctors for Appellees.

[Endorsed:] Von Lingen *vs.* Davidson. Citation.

163 THE UNITED STATES OF AMERICA, } *to wit:*
District of Maryland, }

To George A. Von Lingen Carl A. Von Lingen and William G. Atkinson, co-partners trading as A. Schumacher and company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, on the second Monday of October next, pursuant to an appeal from the decree of the circuit court of the United States for the fourth circuit in and for the district of Maryland, passed in a cause in said court wherein you were appellants and T. H. Davidson and others, owners of the steamphip "Whickham," were appellees, to show cause, if any there be, why the said decree so as aforesaid passed should not be corrected and speedy justice done to the parties in this behalf.

Witness my hand and seal, this 25th day of April, A. D. 1881.

HUGH L. BOND, *C't Judge.* [SEAL].